"We who strive at your bar venture to think ourselves also in some measure consecrated to the task of administering justice. Recent opinions have reminded us that the initiative in reconsidering legal doctrine should come from an adequate challenge by counsel. Lawyers are close to the concrete consequences upon daily life of the pronouncements of this Court. It is for us to bring the cases and to present for your corrective action any wrongs and injustices that result from operation of the law."

—*Robert H. Jackson.**

*Address of the Attorney General of the United States to the Chief Justice and Associate Justices at the ceremonies in commemoration of the 150th Anniversary of the Supreme Court, February 1, 1940.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 73

■

NICK FALBO, *Petitioner*

v.

THE UNITED STATES OF AMERICA

■

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner's
PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

To persuade one justice who concurred in the judgment to *desire* reconsideration, and to aid a 'majority of the court to so determine', is the delicate and difficult task petitioner here undertakes. He realizes that upon a clear showing that grave error was committed in deciding this case, members of this court will be the first to acknowledge the mistake and

promptly take steps to correct it. The fact that the court carefully and thoroughly considered issues presented does not alone establish *correctness* of its conclusions, as was exemplified by its original decisions on the *flag* and *license-tax* cases involving rights of Jehovah's witnesses.

This petition is NOT A REHASHING of what was previously written and said. It raises an entirely new proposition on constitutional law which affects the construction of the statute. Many additional cases, *conflicting* with conclusions reached in this case, are discussed.

If this court erred, as is here charged, an irreparable injury will flow from the decision. Hundreds, yes, thousands, of innocent persons will suffer illimitable harm. A belated correction of error will do little or no good. In this land there is no higher human agency to which an appeal for correction can be made. These facts, together with the court's position of high trust and heavy obligation owed to the people through the Constitution—of which this court is at all times conscious—should suggest to those justices constituting the majority to cast aside any human predilections in favor of their previously expressed opinion while considering this petition, and to regard the questions as though they had never been decided by this court.

On this there can be no middle ground. Either the dissenting justice is deadly wrong and petitioner's counsel has a serious case of agnosia, or else the majority justices have

committed one of the most grievous errors against the constitutional right to a judicial trial that has, in the history of the court, ever occurred. Counsel asks indulgence of the court as this difficult and delicate task is approached and tackled.

Grounds

1. Grave error has been committed by this court in construing the statute and regulations thereunder so as to constitute a bill of attainder contrary to clause 3, section 9, of Article I of the United States Constitution.

2. This court committed fundamental error in construing the Act and Regulations so as to violate the rights of petitioner contrary to Article III of the United States Constitution and the Fifth and Sixth Amendments thereto.

3. This court committed fundamental error in holding that in a criminal prosecution for refusal to comply with a final order of the local board the district court could not inquire whether the board had jurisdiction over the petitioner to order him to report for induction or acted wholly in excess of its authority, and contrary to the Act.

4. This court committed fundamental error in holding that petitioner is properly denied judicial review of the order of the local board because he failed to comply with said final order in the selective process under the Act.

5. This court committed fundamental error in holding that petitioner could not show in defense to the indictment that he was exempt from duty under the Act because a *minister of religion.*

6. This court committed fundamental error in overruling the assignments of error.

7. This court committed fundamental error in affirming the judgments of the courts below.

DISCUSSION

The American doctrine of judicial supremacy established by the people of the United States through the Constitution places this court in a high and peculiarly responsible position that abrogates the erroneous conclusions reached by the court in this case.

To avoid oppression of the people by usurpation of power, this court, as expositor and protector of the fundamental law, carries the grave duty of maintaining the delicate balances of the three branches of government. In discharging this supreme and direct responsibility to the people the court cannot surrender its judicial power nor transfer its responsibility to make judicial determinations to an executive or legislative agency. This non-transferable jurisdiction must be maintained to preserve the great ideals of liberty against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith.

"Great maxims, if they may be violated with impunity, are honored often with lip-service, which passes easily into irreverence. The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression,

in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them."[1]

Supremacy and independence of the American judiciary was the subject of a studied examination made by Chief Justice Taney in his opinion reported in full in the appendix to *Gordon* v. *United States,* 117 U. S. 697. That opinion is said to have been his last judicial utterance, placed in the hands of the clerk shortly before his death. There the act of Congress provided that the judgments of the Court of Claims entered against the United States should not be paid until an appropriation had been estimated by the Secretary of the Treasury and approved by Congress. The Act was held unconstitutional because it made the process of the Court of Claims, and ultimately this court in cases appealed to it, dependent on the future actions of the Secretary of the Treasury and Congress. After a full and learned discussion of the functions of the departments of government in which the independence of the judiciary as established by the Constitution was emphasized, the Chief Justice declared, at page 706:

"These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial power entrusted

[1] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven 1921), pp. 92-94. See also Jefferson's *Works*, Vol. 3, p. 223, where it is said: "All the powers of government—legislative, executive, and judiciary—result in the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. . . . An elective despotism was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others."

to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution."

The basic pronouncements of the strict limitation imposed upon the judiciary by the Constitution, as declared by Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch 137, cannot be overlooked; and it would be well for this court to consider again those profound principles of justice.

Daniel Webster declared: "No conviction is deeper in my mind than that the maintenance of the judicial power is essential and indispensable to the very being of this government. The Constitution without it would be no constitution; the government, no government. I am deeply sensible, too, and, as I think, every man must be whose eyes have been open to what has passed around him for the last twenty years, that the judicial power is the protecting power of the whole government."[2]

Mr. Taft, when President, on vetoing the "recall" section of the Arizona Constitution, said: "In order to maintain the rights of the minority and the individual and to preserve our constitutional balance, we must have judges with courage to decide against the majority when justice and law require."[3] When Chief Justice he decreed: " . . . this is a government of laws and not of men."[4]

When this case was first submitted to the court the question was squarely presented: May a federal court, high or low, exercising this great judicial power entrusted to it by the people of the nation under Article III of the Constitution, by usurpation of the legislative powers through misconstruction of a criminal statute, as a *penalty* deny to a defendant in a criminal case, for having failed to obey an administrative order, the admitted defense that the order was void, illegal and in excess of the board's authority conferred by statute?

[2] Webster's *Works*, Vol. 3, p. 176.

[3] Special Message to Congress, August 15, 1911.

[4] *Truax* v. *Corrigan*, 257 U. S. 312, 332.

Never, before this decision, has this tyranny been sustained by any American appellate court. In petitioner's main brief it was pointed out that the inadequate judicial review thus offered, beset as it is by such a deterrent, violates Article III of the Constitution as well as the Fifth and Sixth Amendments thereto; and therefore the court was urged to construe the statute so as to avoid this result.

After the government's brief was filed it seemed necessary only to further clarify the previously taken position on these three constitutional provisions. The court has now considered those serious constitutional objections and has ruled that fundamental law was not violated in this respect.

When so concluding, the majority of the court was, we submit, in error; and for reasons stated in briefs heretofore filed the conviction should be reversed. The action of the court in throwing the weight of its authority with the forces of the government in this "battle" drove petitioner to search for heavier artillery, so to speak. That search has brought to light a new and stronger constitutional objection not previously considered by either the court or counsel, being overlooked in the pre-occupation with the other propositions involved.

Judicial Legislation Transforms Statute into an Act of Attainder

As construed and applied by the majority of this court, Section 11 of the Selective Training and Service Act, containing the criminal sanctions, is manifestly repugnant to Clause 3 in Section 9 of Article I of the Constitution, which provides: "No bill of attainder or ex post facto law shall be passed."

Many times this court has said that it must construe the federal statutes in such a manner as to remove all doubt as to their unconstitutionality. If there is reasonable doubt that a certain construction given a statute brings it into collision with the Constitution, a different construction

must be employed, if possible, so as to avoid conflict with the fundamental law of the land.

"The cardinal principle of statutory construction is to save and not destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same."[5]

Thus a re-examination of this case in the light of this constitutional provision is imperative. The hideous tyranny that gave rise to the inclusion of this clause in the Constitution is well known by every student of history. The oppression, injustice and despotism those ancient "bills of attainder" inflicted on the people of three centuries ago must not now be resurrected in this time of governmental crisis to subvert the system of law the American people have fought, lived and died to preserve. Therefore the question is deserving of the most exacting judicial scrutiny.

The learned scholar Richard Wooddeson, a contemporary of that dark period in English history, in one of his series of lectures at Oxford University delivered during the term commencing in 1777, gives us a description of the tyrannical system of attainders. Those lectures are collected in the volume entitled *A Systematical View of the Laws of England.* In Lecture XLI (pp. 621-648) we read, *inter alia:*

"All of the modes of criminal prosecutions hitherto spoken of, whether by impeachment or otherwise, are vindications of the laws in being, on which they are wholly founded. But besides the regular enforcement of established laws, the annals of most countries record signal exertions of penal justice, adapted to exigencies unprovided for in the criminal code. Such acts of the supreme power are with us called *bills of attainder* which are capital sentences, and bills of pains and penalties, which inflict a milder degree of punishment."

[5] *N. L. R. B.* v. *Jones & Laughlin Steel Corp'n,* 301 U. S. 1, 30.

Wooddeson proceeds to explain about the different kinds of bills of attainder and their effect. The one most like the bill of attainder found in the criminal sanctions clause of Section 11 of the Selective Training and Service Act of 1940 provided for a trial before the court of the King's Bench in which the questions of trial before the jury were limited to whether or not the defendant was the person named in the bill, and whether or not he failed to report at the time and place mentioned in the bill.

The similarity between the proceedings in such trials and those under the Act here challenged is striking and shocking. At pages 625 to 630 Wooddeson says:

"First as to the crime. It has been usual in times of domestic rebellion to pass acts of parliament, inflicting the penalties of attainder on those by name, who had levied war against the king, and had fled from justice, provided they should not surrender by a day prefixed. Such bills have been compared to process of outlawry at common law. But they are not to be eluded, like attainders on that process, to which many pleas and exceptions may be taken. The scope of such laws we are now considering seems to respect the crime. No alteration is made in the legal rules of evidence. Supposing the prisoner's identity of person, or his surrendering by the time limited be contested, these questions are to be decided by the same testimony as would be admissible on other trials. Neither is any varied modification of punishment. But a material innovation is made respecting the crime. For neglecting to surrender by the appointed day constitutes, or rather indeed consummates the new treason, against which the attainder is directed. Until that time it is inchoate, and unripe for the operation of the particular statute. . . .

"The acts of attainder, passed against domestic rebels, are enforced in a summary mode. No indictment is preferred to a grand jury; but the statute is certified into the chancery by the clerk of the parliament, in pursuance of a writ to him directed for that purpose. It is afterward re-

moved into the King's Bench; and there the whole being entered on record, the prisoner is asked what he has to allege, why execution should not be awarded against him. If a question of fact arises, as to identity of person, or a due surrender in time, a jury is summoned to meet instanter; and, as both these may be termed collateral issues (that is, not the general one, which in criminal cases is 'guilty' or 'not guilty') the prisoner on the one hand seems not to be entitled to peremptory challenges, but on the other, to have a right to the full assistance of counsel."

The striking parallelism of those English bills of attainder with the conclusions reached by the court in this case is compelling. It should be noticed that the English bills of attainder for treason were identical with the conclusion reached by this court in this case. Such English 'bills of tyranny' provided that an individual or class of individuals were guilty of the crime of treason unless they reported at a certain time and place and surrendered themselves to the mercy of the king's henchmen. If such person or persons failed to report at the time and place indicated they were "tried" and "convicted" of the crime of treason. Upon the trial the issue was confined to whether or not the accused was the person named in the bill and whether or not he failed to report at the time and place named.

In cases prosecuted under the Selective Training and Service Act of 1940, the legislative creature (i.e., each local board acting as the arm of the executive branch) reports to the Department of Justice that the exempt person was found "guilty" by the board of owing a duty for training and service under the Act and was ordered to surrender himself at a time and place fixed by the administrative agency. For this the defendant is conclusively presumed, as in the English attainder cases, to be guilty of violating the statute. Upon his so-called "trial" the issue is limited to whether or not the accused is the person named in the indictment and whether he failed to report as ordered by the 'creature of the legislature'.

Manifestly that is a modern-day, streamlined, twentieth-century *bill of attainder!* In no other way can it be better described. In the English attainder cases there was no inquiry as to whether the defendant had committed treasonable acts; and in the cases under the Act in question there is no inquiry as to whether the defendant owed a duty.

The right to prove innocence was then and is now a very substantial right.

The evil aimed at by the founders of this nation when embodying the article in the Constitution was the arbitrary and summary denial of every person's freedom to exercise the right to prove innocence in a court of justice, as such denial was practiced under the English bill of attainder.

The founders also desired to escape the insurmountable obstacle of a conclusive presumption of "guilt" that followed the bill of attainder into the court even as now a like presumption follows the order to report for induction into a district court in these United States.

Here and now, under the Act in question, the judge is given the right to fix the punishment but that does not prevent the Act's becoming the bill of attainder. The vice in the proceeding is that prior to imposition of sentence all semblances of judicial process are ignored and nullified by the rulings of the court denying the defendant's freedom to exercise his right to be heard. Although the district judge and the jury act as RUBBER STAMPS for the administrative agency that does not save the statute or the proceedings; for indeed the tribunals, in the days when attainders flourished, were similarly misused.

The fact that in 1917 Congress did not provide for criminal prosecutions in the civil courts, but left the matter of enforcement of the Act in the hands of the military authorities, does not alter the fact that in the 1940 Act (which in this respect differs from that of 1917) such enforcement, as to persons who refuse to submit themselves to the military authorities as ordered, is placed exclusively in the jurisdic-

tion of the United States District Courts. In this land there can be no justification for trial procedure contrary to that ordained by the Constitution. The duty of the courts to enforce wartime laws does not override the rights of every inhabitant of this land to be protected against denial of due process and to enjoy freedom from bills of attainder and ex post facto laws.

Framers of the Constitution of the United States were well aware of the unjust consequences that would inevitably flow from the use of attainders in this country. While at the time of the adoption of the Constitution some doubt was expressed as to the need for a specific prohibition on powers of Congress in this connection, to guard against the possibility of such a legislative usurpation of the judicial function, the *attainder* clause was enacted in its present form without opposition.[6]

The evil of an act of attainder is that it transfers the determination of criminal liability of citizens out of the exclusive jurisdiction of the courts[7] and vests in the legislature the uncontrolled prerogative to declare named individuals or designated classes of individuals to be criminal violators of certain laws and deprives the judiciary of its constitutionally assigned duty to interfere with those individuals' being so declared (i.e., 'framed') through form of law and, instead, imposes upon the courts the onerous task of judicially sanctioning the travesty.

Under this arrangement it is small wonder that the jury in the trial court found that the only "issue" they were to "decide" was obvious, being openly admitted by everyone in the courtroom before the jury retired to "consider" the evidence!

It is submitted that Nick Falbo was the victim of this act

[6] See *Debates on the Adoption of the Federal Constitution*, Jonathan Elliott, Washington, 1845, Vol. 5, p. 462; *The Federalist*, No. 44 (James Madison) and No. 84 (Alexander Hamilton).

[7] "It is emphatically the province and duty of the judicial department to say what the law is." MARSHALL, C. J., *Marbury* v. *Madison*, 1 Cranch 137.

of attainder, in which his guilt was conclusively predetermined by the draft board when acting as the executive agent of the legislature, and that now he languishes in prison under a heavy criminal penalty without ever having been found guilty in a court of justice of violation of any law—except the act of attainder, which in truth and in fact is not a law under the United States Constitution.

Closer consideration of the operation of the Act as construed in the majority opinion further reveals the true identity of its criminal sanctions section as an act of attainder:

The definition of crimes and the fixing of appropriate penalties is, of course, a proper legislative function. But when the legislature (or the executive authority) undertakes to promulgate a device whereby any specified individual or class of individuals can be *arbitrarily and summarily* declared guilty of violation of such law, then that law plainly is a bill of attainder. This peculiar characteristic makes such laws easily identifiable.

In the past "expurgatory oaths", so called, have been a favorite means of identifying the guilty class. Those unable or unwilling to subscribe to the oath were arbitrarily and summarily declared guilty without the benefit or protection of judicial review.

This courts construction and application of the Act in this case to justify petitioner's "conviction" as a violator revives and sanctifies that ancient "expurgatory oath" technique. Those unable or unwilling to subscribe to the 'oath' are arbitrarily and summarily presumed and declared to be guilty of a violation of their lawful duty under the Act. The only crime alleged in the indictment and the sole issue to be proved on the trial is the fact that the 'oath' was not taken when ordered to be taken under the Act. If the jury finds such to be true, then the court imposes the statutory penalty.

Statutory exemption of petitioner from duty is a fact that vitally affects jurisdiction of the administrative agency.

This court has admitted that it is an issue which must be judiciously and judicially considered by the courts under the Act—but exercise of that right is denied until petitioner undergoes a certain ceremony of induction. So to condition petitioner's free exercise of that right is to place the Selective Service Act in a singular position. A defendant's right of review through judicial inquiry into *jurisdictional facts* of a controversy decided by any other administrative agency is not thus proscribed and conditioned upon compliance with some irrelevant prerequisite; hence all of such agencies' reviewable functionings are constitutionally permissible.

But by permitting a conviction upon the mere showing of a failure to respond to the order to report for having administered to him the oath of induction the exempt person is pronounced guilty without any of the formal judicial safeguards ordinarily allowed in criminal proceedings, in exactly the same manner as judges in England proceeded under bills of attainder. If a law permits the legislature or the administrative agency to make a conclusive determination as to essential facts of guilt, namely, (1) the duty for service and (2) exempt status under the Act, it is the same as being pronounced guilty in a legislative decree which is merely handed to the judiciary for execution, all of which is precisely in the fashion of English bills of attainder.

Thus it is again manifest that respective functions constitutionally prescribed for the present American Government's judicial, executive and legislative branches are wrongly intertwined, perverted and confused in a manner wholly un-American—pernicious and foreign to the orderly practice conceived and defined for each of the three branches by the framers of the Constitution. In such distorted setting the legislature is, as it were, put on a pedestal as "sovereign", the executive and judicial branches becoming its puppets, while the sovereign people play the role of serfs of the "sovereign" Legislature!

In the instant case, the construction given the Act makes the rules of reasonable doubt, presumption of innocence,

etc., impotent and void, and entirely denies the real function of the jury to determine the facts of guilt of the defendant. Thus the Act deprives a certain class of citizens of their liberty without any of the judicial safeguards provided for the security of this land's every inhabitant in the courts; and it is, therefore, an act of attainder as harsh and cruel as those administered by the English despots of the 17th century.

As construed and applied by this court, the Act conclusively presumes the innocent and exempt defendant to be a felon unless he takes the 'expurgatory oath' through subjecting himself to the ceremony of induction. Then and only then—*after* obeying the command thus to subject himself—does he become endowed with the right to speak in his defense! Obviously this is a pernicious and wholly alien fallacy.

Both the Congress and this court should know that to allow an exempt minister or a deferred conscientious objector the right to judicial review only upon taking of an oath that violates his conscience is tantamount to imposing pains and penalties prohibited by the bill of attainder clause. It should be remembered that the law here does not provide for automatic induction into the armed forces after a certain time as did the 1917 Act. This was intentionally avoided by Congress. The induction act is contemplated as a voluntary act on the part of the individual. Thus to force one to unwillingly submit to induction as a condition to judicial review is nothing short of the tyrannical bill of attainder.

By construing the Act as it has, this court sanctioned a legislative method of exercising criminal jurisdiction against a class of persons who are exempt and have no duty under the Act. The court has dispensed with the ordinary judicial forms and rules for the trial of one by indictment before a jury. The action of the court is the same as denying all of the affirmative defenses in murder and rape cases because the defendants "flouted the law", and providing that review would have been permitted by habeas corpus if the

defendant had pleaded guilty or *nolo contendere*. For trial of indictments under the Act the court has done away with all the ordinary forms of legal precedents governing trials in criminal cases. Because of the contempt of the draft boards and failure of petitioner to obey the order, the court has taken away whatever advantages naturally accrue to petitioner under the highly protective system of law in the trial of criminal cases. By barring any judicial inquiry as to duty of an exempt person under the Act the court has approved the "star chamber" conviction of petitioner without any evidence of guilt or breach of duty being produced in court against him. Astonishing as it may seem, the court has solemnly decreed that the Federal judiciary cannot judicially recognize an accused citizen brought before it as entitled to the rights of a trial unless such person shows that he has taken what in effect becomes an "expurgatory oath" of induction and appears before the bar garbed formally as a ceremonially inducted national servant.

Before discussing cases it seems appropriate to consider further the historical background of such tyrannical laws. *The Catholic Encyclopedia*[5] inter alia states: "A Bill of Attainder may be defined to be an Act of Parliament for putting a man to death or for otherwise punishing him without trial in the usual form. Thus by a legislative act a man is put in the same position as if he had been convicted after a regular trial. . . . In the popular sense, however, the term 'Bill of Attainder' embraces both classes of acts, and in that sense it is evidently used in the Constitution of the United States, as the Supreme Court has declared in Fletcher v. Peck, 6 Cranch 138, that 'A bill of attainder may affect the life of an individual, or may confiscate his property, or both'. Such a bill deals with the merits of a particular case and inflicts penalties, more or less severe *ex post facto*, without trial in the usual form. While bills of attainder were used in England as early as 1321 in the procedure employed

[5] Vol. II, p. 59.

by Parliament in the banishment of the two Despensers (1 St. tr. pp. 23, 38), it was not until the period of passion engendered by the civil war that the summary power of Parliament to punish criminals by statute was for the first time perverted and abused."

Says the *Encyclopædia Britannica*:[9] "*Bills of Attainder*, in English legal procedure, were formerly a parliamentary method of exercising judicial authority. They were ordinarily initiated in the House of Lords and the proceedings were the same as on other bills, but the parties against whom they were brought might appear by counsel and produce witnesses in both Houses. . . . First passed in 1459, such bills were employed, more particularly during the reigns of the Tudor kings, as a species of extrajudicial procedure, for the direct punishment of political offences. Dispensing with the ordinary judicial forms and precedents, they took away from the accused whatever advantages he might have gained in the courts of law; such evidence only was admitted as might be necessary to secure conviction; indeed, in many cases bills of attainder were passed without any evidence being produced at all. In the reign of Henry VIII they were much used, through a subservient parliament, to punish those who had incurred the king's displeasure; many distinguished victims who could not have been charged with any offence under the existing laws being by this means disposed of."

Judge Cooley[10] said: "A bill of attainder was a legislative conviction for alleged crime, with judgment of death. Such convictions have not been uncommon under other governments, and the power to pass these bills has been exercised by the Parliament of England at some periods in its history, under the most oppressive and unjustifiable circumstances, greatly aggravated by an arbitrary course of procedure, which had few of the incidents of a judicial investigation into alleged crime. . . . Every one must concede

[9] Vol. 2 (1942 ed.), p. 656.

[10] *Constitutional Limitations*, 8th ed., Vol. 1, pp. 536-539.

that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited,—the very class of cases most likely to be prosecuted by this mode. And although it would be conceded that, if such bills were allowable, they should properly be presented only for offenses against the general laws of the land, and be proceeded with on the same full opportunity for investigation and defense which is afforded in the courts of the common law, yet it was remembered that in practice they were often resorted to because an obnoxious person was not subject to punishment under the general law, or because, in proceeding against him by this mode, some rule of the common law requiring a particular species or degree of evidence might be evaded, and a conviction secured on proofs that a jury would not be suffered to accept as overcoming the legal presumption of innocence. Whether the accused should necessarily be served with process; what degree or species of evidence should be required; whether the rules of law should be followed, either in determining what constituted a crime, or in dealing with the accused after conviction,—were all questions which would necessarily address themselves to the legislative discretion and sense of justice; and the very qualities which are essential in a court to protect individuals on trial before them against popular clamor, or the hate of those in power, were precisely those which were likely to prove weak or wanting in the legislative body at such a time. And what could be more obnoxious in a free government than the exercise of such a power by a popular body, controlled by a mere majority, fresh from the contests of exciting elections, and quite too apt, under the most favorable circumstances, to suspect the motives of their adversaries, and to resort to measures of doubtful propriety to secure party ends?

"Nor were legislative punishments of this severe character the only ones known to parliamentary history; there were others . . . called bills of pains and penalties . . . ; and the term 'bill of attainder' is used in a generic sense, which would include bills of pains and penalties also. . . .

"The conviction of the propriety of this constitutional provision has been so universal, that it has never been questioned, either in legislative bodies or elsewhere. Nevertheless, cases have recently arisen, growing out of the attempt to break up and destroy the government of the United States, in which the Supreme Court of the United States has adjudged certain action of Congress to be in violation of this provision and consequently void."

Judge Story[11] says: "In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of a trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency and too often under the influence of unreasonable fears or unfounded suspicions. . . . The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of proof; and sometimes, because the law, in its ordinary course of proceedings, would acquit the offender. The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of the power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the most virtuous citizens. Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of vio-

[11] *Commentaries on the Constitution of the United States* (Bigelow, 1891), Vol. 2, p. 216, s. 1344.

lent political excitements; periods in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others."

It cannot be argued that because the *locus in quo* of the proceedings were in the judicial arena or a place called a court such fact would prevent the act from being such an unconstitutional law. The presence of a judge, disrobed of his judicial powers, and the attendance of a jury, subservient to the court's charge that they cannot inquire into the innocence of the defendant, does not take the law, as construed, out of the condemnation pronounced by the writers of the Constitution speaking for the people of these United States. The usual instruments of justice may easily become the instruments and agency of a tyrannical legislature in such proceedings, as is clearly demonstrated in the record of this case. All judicial powers and institutions of justice were literally thrown to the winds to accomplish the demands of expediency.

This court has had previous occasion to examine the unconstitutionality of bills of attainder. The most famous case is that of *Cummings* v. *Missouri.*[12] Cummings, a Roman Catholic priest, was prosecuted under provisions of the Missouri Constitution making it mandatory for all preachers, priests and ministers to subscribe to an oath regarding their past affiliation with the Confederacy. Cummings refused to take the oath and he was prosecuted and finally forced to appeal to this court. The fact that the bill of attainder proceedings against him under the state constitution and statutes were instituted and prosecuted in a Missouri court did not prevent nullification of the conviction because of its repugnancy to the Federal Constitution prohibiting states from passing bills of attainder. This court[13] said: "We do not agree with the counsel of Missouri that to punish one is to deprive him of life, liberty, or property,

[12] 4 Wall. 277.

[13] 4 Wall. 320-332.

and that to take from him anything less than these is no punishment at all.' . . . The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. . . .

"'Some punishments,' says Blackstone, 'consist in exile or banishment, by abjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment. Some extend to confiscation or forfeiture of lands or both, or of the profits of land for life; others induce a disability of holding offices or employments, being heirs, executors and the like.'

". . . Any deprivation or suspension of any of these rights for past conduct is punishment, and can in no otherwise be defined. . . .

"It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. In *Fletcher* v. *Peck*, 6 Cranch 137, Mr. Chief Justice Marshall, speaking of such action, uses this language: 'Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. . . .'

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

"If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge. It assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party, with-

out any of the formal safeguards of trial; it determines the sufficiency of proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence. . . .

"These bills are generally directed against individuals by name; but they may be directed against a whole class. . . . These bills may inflict punishment absolutely or may inflict it conditionally.

"The bill against the Earl of Clarendon, passed in the reign of Charles the Second, enacted that the earl should suffer perpetual exile, and be for ever banished from the realm; and that if he ever returned, or was found in England, or in any other of the King's dominions, after the first of February, 1667, he should suffer the pains and penalties of treason, with the proviso, however, that if he surrendered himself [reported for induction] before the said first day of February for trial, the penalties and disabilities declared should be void and of no effect. (Printed in 6 *Howell's State Trials*, p. 391.) [Bracketed words added]

"'A British Act of Parliament,' to cite the language of the Supreme Court of Kentucky, 'might declare that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it . . . .' (*Haines* v. *Buford*, 1 Dana 510)

"If the clauses of the second article of the Constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty, or should be held guilty of having been in armed hostility to the United States, or of having entered that State to avoid being enrolled or drafted into the military service of the United States, and therefore should be deprived of the right to preach as a priest of the Catholic Church, or to teach in any institution of learning, there could be no question that the

clauses would constitute a bill of attainder within the meaning of the Federal Constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And, further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts [report for induction], they would be no less within the inhibition of the Constitution. [Bracketed words added]

"In all these cases it would be the legislative enactment creating the deprivation without any of the ordinary guards provided for the security of the citizen in the administration of justice by the established tribunals.

"The results which would follow from the clauses of the character mentioned do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to teach or preach unless the presumption be first removed by their expurgatory oath—in other words they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmakers in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly, cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition

can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

" . . . This deprivation is punishment, nor is it any less so because a way is opened for escape from it by the expurgatory oath. The framers of the Constitution of Missouri knew at the time that whole classes of persons would be unable to take the oath prescribed. To them there would be no escape provided; to them the deprivation was intended to be, and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act. . . .

" . . . They impose the same penalty, without the formality of a judicial trial on conviction; for the parties embraced by the supposed enactments would be incapable of taking the oath prescribed; to them its requirement would be an impossible condition . . . "

IN THE CASE AT BAR denial of petitioner's right to present his defense (guaranteed by due process) for declining to take the "expurgatory oath" through submitting to ceremonial induction, is absolutely indistinguishable from the denial of liberty of the priest Cummings for refusing to take the prescribed oath.

With the passing of time, *enlightened* mankind has become so far removed from the prevailing recognized use of bills of attainder in England that it is easy for modern man to meet up face to face in the middle of the road with a streamlined twentieth-century bill of attainder and be unable at once to recognize it as the type condemned by the founding fathers, especially when it is tied onto a war law.

One of the most notorious acts of attainder was that passed by Parliament in the 17th century against the Earl of Strafford (Thomas Wentworth) because of his supposed acts of treason.[14] History shows that the bill of attainder

[14] *Famous Trials of History*, Birkenhead (Doubleday, Doran & Co., New York, 1926), Vol. 1, pp. 33-47.

enacted by Congress (according to this court) so as to deny the right to be heard in the defense to indictments affecting many hundreds, if not thousands, of persons, is comparable to the aforesaid bill of attainder prosecuted against the Earl of Strafford. It was such an outrage committed in the name and by the authority of the King and Parliament that official efforts were made to expunge the proceedings from the record. Wooddeson[15] says: "The bill of attainder was a private act, and is preserved for our inspection only perhaps by Rushworth in his account of the trial. For the reversing statute (which is placed, whether properly or not, among the public acts) ordained that all records and proceedings of parliament relating to the said attainder, should be wholly cancelled and taken off the file or otherwise defaced and obliterated, to the intent the same might not be visible in after ages, or brought into example to the prejudice of any person whatsoever."

Here it seems appropriate to suggest that should this court, on reconsidering this case, reach the conclusion that it has erroneously transformed the Act of Congress into a bill of attainder, appropriate steps be taken by the court, as author of the amendment, to expunge from its records the interpretation placed on the statute for the same reasons that compelled Parliament to repeal the highly unjust act of attainder against the Earl of Strafford. It is hoped, however, that this court does not act to correct its error as belatedly as did the Parliament, which waited until long after the death of the unfortunate earl to repeal the Act. The justice of a homely axiom is indeed apropos: "It is too late to lock the corral gate after the horse is stolen." If the court delays to correct its error until the need for a selective service act is past, the mischief of the act of attainder will have been wrought and the disgrace of this outrage inextinguishably seared into the history of the land of the free.

The Act as construed also smacks of *ex post facto* iniq-

[15] *A Systematical View of the Laws of England*, Lecture XLI, p. 633.

uity. Each draft board has been empowered by the court to conclusively deny existence of facts which show the board has no jurisdiction and, also, to find an exempt person liable for duty. Congress said in 1940, when passing the Act, that such persons have no duty. In 1943, by the construction placed on the Act, this court confers upon the boards the authority to conclusively and finally interpret the provisions of the statute for exempting ministers, Section 5 (d) of the Act. Persons thus specifically exempted are later, through arbitrary fiat by a local board, declared to be within the anathema of the criminal sanctions clause. Since such construction of the statute by the local boards is binding upon the courts, an innocent person may be punished for an act not even interdicted by a written law of Congress. Not many years ago this court[16] said: "A statute, therefore, which imposes heavy penalties for violation of commands of an unascertained quality, is in its nature somewhat akin to an *ex post facto* law since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question."[17]

Constitutional Requirement of Unpenalized Judicial Review

Can it be doubted that the requirement of reporting at a given time and place for the purpose of submitting to ceremonial induction amounts to an "expurgatory" procedure that conclusively brings within the penalty of the statute a class of citizens unable or unwilling to submit thereto?

This particular mode of "expurgation", imposed by the opinion of the court, deserves brief consideration.

If the person or persons named in one of the English

[16] *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 662.

[17] See, also Mr. Justice Stone's statement in *Beazell* v. *Ohio*, 269 U. S. 163, 169.

acts of attainder surrendered themselves to the King in obedience to his command, their action was regarded as an admission of guilt and they were punished according to the King's pleasure without the need of a judicial proceeding. Exactly similar is the situation in which petitioner found himself. By reporting for induction he must *ipso facto* surrender his civilian status and civil rights. So doing, he immediately becomes amenable to military law and for infractions thereof he is punishable at the pleasure of the military tribunals without recourse to the civil courts. The fact that he may have the right to petition the civil courts for a writ of habeas corpus does not save him from being penalized by the military tribunals. If he fails to file his petition for a writ of habeas corpus or is unsuccessful upon a hearing thereof, he may be subjected to any of many military penalties, which are much more severe than those prescribed by the questioned Act,[18] before he can appeal his civil case. Penalties thus incurred would thereafter prevent his release regardless of appellate disposition of the habeas corpus application.

Irreparable injury to which he is thus subjected, if forced to submit to induction as a means of testing the validity of the order, must be conceded to be greater than any inconvenience or injuries this court has held in other cases to be grounds for allowing judicial review prior to compliance with administrative process.[19] In the last war there were

[18] Violation of his new military obligations may subject the inductee to a sentence of death under Article 64 of the Articles of War. (Sec. 1, ch. II, Act of June 4, 1920, 41 Stat. 787) Cf. Note 21, page 29, infra.

[19] Grave problems faced by civil and military authorities in the last war are calmly analyzed in "The Conscientious Objector" (21 Columbia U. Q'terly 253) (1919) by Harlan F. Stone; see, also, *Statement by the Third Assistant Secretary of War Concerning the Treatment of Conscientious Objectors in the Army* (1919), Government Printing Office; *The Conscientious Objector* (Boni and Liveright, New York, 1919), Walter Guest Kellogg, Major, Judge Advocate, U. S. A., chairman of the Board of Inquiry.

over 500 court-martial cases of conscientious objectors.[20] Records of the Office of the Judge Advocate General show that "since Pearl Harbor" the treatment of Jehovah's wit-

[20] The *Statement* (Note 19, supra) includes the following summary of court-martial cases of conscientious objectors, compiled to June 7, 1919 (pp. 53-54):

Tried by courts-martial	504
Acquitted	1
Convicted and sentenced	503
Disapproved:	
By reviewing authority	3
On recommendation of Judge Advocate General	50
Effective sentences	450

ORIGINAL SENTENCES OF COURTS

Death	17	2	years		3
Life	142	50	"		3
10 years	89	8	"		1
20 "	73	11	"		1
25 "	57	12	"		1
15 "	47	13	"		1
5 "	29	18	"		1
30 "	19	28	"		1
3 "	5	45	"		1
1 year	4	99	"		1
40 years	4				
Less than 1 year	3				503

SENTENCES AS FINALLY EXECUTED AFTER REVIEW BY REVIEWING AUTHORITIES AND BY JUDGE ADVOCATE GENERAL'S OFFICE

25 years	166	50	years		2
10 "	94	35	"		1
15 "	65	8	"		1
20 "	49	11	"		1
5 "	32	12	"		1
30 "	18	13	"		1
3 "	8	18	"		1
1 year	4	28	"		1
Less than 1 year	2	Sentence disapproved and accused released			53
2 years	2	Sentence suspended			1
					503

Sentences mitigated by reviewing authorities	185
Sentences mitigated on recommendation of Judge Advocate General	11

nesses and conscientious objectors inducted has been severe.[21] To one not subject to duty of training and service imposed by the Act, the order to report for induction is the equivalent of an order banishing him from his position in society, and is, therefore, a very severe penalty, and one to which he should not be required to submit without opportunity for judicial review.

Often this court has held that the right to judicial review (claimed by the majority justices to be available to petitioner through writ of habeas corpus) is merely nominal and illusory if the affected party can appeal to the courts only at risk of undergoing penalties so great that it becomes preferable to yield to orders of uncertain legality rather than to ask for protection of the law. To refresh the memory of the court, discussion of a few of those cases follows:

The respected precedent of many years' standing was announced in *Ex parte Young*.[22] The Minnesota legislature passed a law authorizing the Railroad and Warehouse Commission to fix rates which provided for the imposition of enormous penalties for violation of the regulations. The United States Circuit Court granted an injunction to the railroads restraining enforcement of the Act and Regulations as applied to plaintiffs' property because of their confiscatory nature. The state's Attorney General obtained a writ of mandamus in the state courts compelling the railroads to comply with the law. For this he was adjudged in contempt by the Circuit Court. He immediately applied to this court for a writ of habeas corpus. On the hearing he was remanded to custody of the marshal and this court held that the right of judicial review in the state courts in proceedings to collect the penalties was not sufficient to require the railroads to comply with the order or disobey it as a con-

[21] Brutality suffered at hands of military authorities by some of Jehovah's witnesses who reported for induction has also been noticed in the public press; e.g., *Time* magazine, April 19, 1943, p. 26.

[22] 209 U. S. 123.

dition to obtaining review. This court[23] said: "A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

" . . . Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. . . .

"We hold therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

Thereafter, in *Wadley Sou. Ry. Co.* v. *Georgia*,[24] this court found that the Georgia State Railway Commission was empowered by statute to treat all connecting carriers alike in regard to payment of freight in advance or on delivery and that it ordered railroads to cease demanding payment in advance. The act provided for a penalty for failure to comply with the orders. This court said: 'But in what-

[23] 209 U. S. 123, at page 147.

[24] 235 U. S. 651, 660-663.

ever method enforced, the right to a judicial review must be substantial, adequate and safely available, but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law. . . . He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid."

More recently, in *Okl'a Operating Co.* v. *Love*, 252 U. S. 331, this court reached a similar conclusion as to an Oklahoma statute that provided for certain laundry rates. The only way that the rate order could be reviewed was by appeal from the commission to the state supreme court on conviction for contempt by the commission for disobedience to the order. In sustaining the right of judicial review prior to obedience or disobedience to the order, this court struck down the inadequate provision of the Oklahoma legislature, saying: "So it appears that the only judicial review of an order fixing rates possible under the laws of the State was that arising in proceedings to punish for contempt. The constitution endows the Commission with the powers of a court to enforce its orders by such proceedings. (Article IX, ss. 18, 19) By boldly violating an order a party against whom it was directed may provoke a complaint; and if the complaint results in a citation to show cause why he should not be punished for contempt, he may justify before the Commission by showing that the order violated was invalid, unjust or unreasonable. If he fails to satisfy the Commission that it erred in this respect, a judicial review is opened to him by way of appeal on the whole record to the Supreme

Court. But the penalties, which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident. The penalty for refusal to obey an order may be $500; and each day's continuance of the refusal after service of the order it is declared 'shall be a separate offense.' The penalty may apparently be imposed for each instance of violation of the order. In *Oklahoma Gin Co.* v. *Oklahoma,* decided this day, post, 339, it appears that the full penalty of $500 with the provision for the like penalty for each subsequent day's violation of the order was imposed in each of three complaints there involved, although they were merely different instances of charges in excess of a single prescribed rate. Obviously, a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates."

On other occasions this court has held that where no adequate opportunity is afforded a person under an administrative law for a judicial review in advance of submission to or the incurring of possible penalties for disobedience of an administrative order such law is in contravention of due process of law. See *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 53; *Missouri Pac. Ry. Co.* v. *Nebraska,* 217 U. S. 196, 207-208.

No extensive argument is needed to show that induction for any service under the Act imposes heavy duties upon any inductee, forthwith stripping him of his civilian status and of his constitutional rights and freedoms enjoyed under civil law. Immediately upon reporting for induction he becomes subject to military law *ipso facto,* without further action on his part. Refusal or failure to take the oath does not preclude military jurisdiction from attaching. The registrant on induction takes on a new status in much the same way that his obligations change, as when he marries.

When inducted his status is so fixed and certain that it cannot be terminated at will but only according to law. He is a servant; the nation is his master. He must live a life of regimentation and is under very severe discipline. His rights as a private individual are gone. His life is imperiled by dangers of various kinds. He can make no personal choices as to life, liberty or pursuit of happiness, as civilians do. Even in civilian public service camp the inductee, as a national servant, must obey rules of conduct and regimentation very similar to those obeyed by persons subject to military authority. Infraction of the rules is punishable. Forcing one to assume such a change of status constitutes a *penalty* inflicted upon the individual when compared with his status as a civilian. Justice Brewer, dissenting, pointed out that exclusion or deportation of a citizen on the charge that he is an alien is admittedly a *penalty* because it changes his status. *United States* v. *Sing Tuck,* 194 U. S. 161, 179-180 Compulsion of one to undergo a change in status by appearing for induction constitutes a hardship, loss and disadvantage to the civilian; hence it is a penalty. To a registrant *exempt from duty* under the Act it is admittedly a severe penalty to require him to report for induction as a condition to obtaining judicial review. If he claims exemption upon submission to and after induction he is certain to incur severe punishment at the hands of the military authorities, which is far more severe than the punishment provided by the Act for disobedience of an order to report for induction. Once he reports for induction he cannot successfully claim that the denial of civil rights or of rights in the civil courts is a denial of due process of law. This court has held that to those in the national service the military laws and regulations, rigorous though they may be, are due process. *United States ex rel. French* v. *Weeks,* 259 U. S. 326; *United States ex rel. Creary* v. *Weeks,* 259 U. S. 336.

Constitutional Inadequacy of Judicial Review by Habeas Corpus After Induction

Habeas corpus is not an adequate remedy to protect the registrant claiming exemption under the Act. Existence of the remedy and the right to prosecute the action do not suspend military rules and practices nor the inductee's liability thereunder pending a review in the courts. As heretofore shown,[25] those who, like Jehovah's witnesses, claim their exemption and decline to perform the obligations of a soldier, necessarily incur liability for severe penalties and suffer stern punishment. This court's opinion in *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331, and cases there cited, compel the conclusion that habeas corpus, beset as it is with these deterrents, is not an adequate remedy to protect the registrant's civil rights pending final determination of the questions raised. Habeas corpus procedure is a civil action which must be brought at the expense of the petitioner and may prove illusory. The writ must be heard in the jurisdiction where the inductee is held and not where his local board is situated. He may be so far removed from witnesses, friends, family, lawyer and finances as to render impractical successful prosecution of a habeas corpus proceeding. Circumstances often are such as to make prohibitive the instituting of an action for a writ. Especially is this true if the inductee is transported to a foreign shore beyond reach of the judicial process of the United States courts. This might easily result in many, if not all, cases. While trying to marshall his assets, friends, kin and counsel to institute the proceeding he might easily be transferred to a camp in another jurisdiction or entirely removed from the country.

Habeas corpus is not an administrative remedy but is a judicial process and forms no part of the administrative scheme envisioned by Congress. This court has uniformly held that a litigant seeking review for an administrative determination is not required to resort to some extraor-

[25] Notes 19, 20 and 21, pages 27-29, supra.

dinary method of judicial process, such as habeas corpus, as a condition precedent to enjoyment of other existing methods of obtaining judicial review. This court also has held that judicial remedies need not be exhausted before applying to federal courts for relief. *Lane* v. *Wilson*, 307 U. S. 268; *Railr'd & W. Comm'n of Minn.* v. *Duluth St. R. Co.*, 273 U. S. 625. The judicial maxim of exhaustion of administrative remedies is confined to *administrative* remedies provided under the Act. Petitioner was therefore under no obligation to report for induction and then apply for another judicial remedy. The Act does not require it, and certainly no rule of judicial construction authorizes it. He *could have* reported for induction and applied for a writ of habeas corpus, but the law did not require him to do so. The general law of the land provided for two methods of bringing him before the courts or two remedies to obtain judicial review; and the law does not compel him to choose either remedy, and he certainly need not choose the weaker, habeas corpus, and incur the risk of great penalties and dangers.

The further steps to be taken at the induction station do not contemplate a hearing or an opportunity to have the registrant's claim for *exemption* from training and service passed upon. Before the rule requiring exhaustion of administrative process can be applied, the remaining steps must be remedies that enable the registrant to obtain protection of his claim for exemption from duty under the Act. If available steps merely serve to execute and satisfy the administrative process and will not safeguard the aggrieved, then such are not administrative remedies of the kind which must be exhausted as a condition precedent to judicial review. Admittedly, therefore, the administrative step of reporting for induction offers no chance of relief, and hence does not accord with requirements of procedural due process. Resort to such a "remedy" would be hollow formalism, futile; and need not be exhausted as a condition of judicial review. *Utley* v. *St. Petersburg*, 292 U. S. 106. Since the "remedy" does not contemplate a hearing on the claim for

exemption from duty it cannot be regarded as one that needs to be exhausted as a prerequisite to judicial review. *Kansas City Sou. R. Co.* v. *Ogden Levee Dist.* (CCA 8th), 15 F. 2d 637.

Furthermore, petitioner was not obliged to exhaust the so-called remedy declared by this court to exist through reporting for induction, because under law petitioner was a *minister of religion* exempt from all training and service and therefore not subject to induction and not under duty imposed by the Act. This court has held that where one is not subject to an act creating administrative remedies he is not required to exhaust the administrative remedy. In *Gonzales* v. *Williams*, 192 U. S. 1, the Act provided that an alien erroneously denied entry into the United States by the ruling of the Commissioner of Immigration could appeal to the Superintendent of Immigration and thence to the Secretary of the Treasury for relief. It was held that one claiming to be a citizen and not subject to the Act did not have to exhaust these administrative remedies. This court said: "And in the present case, as Gonzales did not come within the Act of 1891, the Commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary; and *she was not obliged to resort to the Superintendent or the Secretary.*" (Italics added) In *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, it was contended that an agency had exceeded its statutory authority and that the order was void for that reason. It was held that the courts had jurisdiction of a suit to enjoin enforcement of such an order, even though plaintiff had not attempted to secure redress in a proceeding before the agency.

The criterion for ascertaining when an administrative remedy has been exhausted is whether the highest administrative or other body of legislative character empowered to act on the classification of the registrant has done so. The appeal board had denied petitioner's claim for exemption. The State and National Directors had refused to exercise their discretion. The unconditional order to report for in-

duction was the last order. It was the execution process issued by the board to enforce the determination of the highest authority within the administrative scheme. Nothing remained for petitioner to do to obtain the exemption allowed him by the law. It was the last order and terminated the proceedings of the system. The military or camp authorities have charge of the induction station, and not the Selective Service System. There the Armed Forces or the Camp Operators take over the registrant. If he disobeys the order he is taken into custody by the Department of Justice. There was no chance for the petitioner to be rejected at the induction center because he had been previously given a physical examination pursuant to the Regulations.

Reporting for induction is not in every case the last step in the selective service process. That is particularly so in the case of a minister. Under the Act he is required only to register. Congress did not contemplate that a minister should report for induction. The rule of exhaustion of administrative remedies does not apply to one who is not subject to nor under any duty for service under the Act,[26] Certainly Congress did not intend that one exempt and not subject to the Act should incur penalties, and forfeit not only his exempt status under the Act but also surrender his civilian status as conditions to obtaining judicial review of the classification illegally given him by the local board.

The order to report is comparable to the judgment of a court.[27] To compel the exempt registrant to submit to an order to report for induction is identical to the condemned practice of forcing a defendant named in a void judgment to comply with it as a condition precedent to attacking it. Such a requirement violates the due process clause and subjects the aggrieved one to the pains and penalties of irreparable injury. This court has uniformly followed the

[26] *Gonzales* v. *Williams*, 192 U. S. 1.

[27] *Chicago, R. I. & P. R. Co.* v. *United States*, 284 U. S. 80; *Carolina Aluminum Co.* v. *Federal Power Comm'n* (CCA 4th) 97 F. 2d 435.

practice of permitting stays of administrative orders pending a review thereof in the courts. To compel one to submit to the requirements of an administrative order makes void the purpose of judicial review.

Constitutional Requirements as to Statutory Construction Allowing Usual Criminal Defenses

It is the duty of this court to give to the statute a reasonable construction. It is a rule of long standing, established by this court, that all reasonable doubts concerning the meaning of a statute should operate in favor of the rights of the defendant. In *Harrison* v. *Vose*, 50 U. S. 372, at page 378, this court said: "In the construction of a penal statute it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent. In *United States* v. *Shackford*, 5 Mason 445, Justice Story says: 'It would be highly inconvenient, not to say unjust, to make every doubtful phrase a dragnet for penalties' (p. 450)." Also, in *United States* v. *Kirby*, 7 Wall. 482, at pages 486-487, the court observed: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. Literal interpretation of the statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned."[28]

The court is not authorized to extend a statute beyond the plain meaning of its terms.[29] In this case the court has

[28] *Sorrells* v. *United States*, 287 U. S. 430, 446; *United States* v. *American Trucking Ass'n*, 310 U. S. 534; *Helvering* v. *Hammel*, 311 U. S. 504, 510; *Ozawa* v. *United States*, 260 U. S. 178, 194.

[29] *United States* v. *Morris*, 39 U. S. 464, 14 Pet. 464; *Pierce* v. *United States*, 314 U. S. 306, 311-312.

certainly read into the statute something that does not exist, thus perverting the manifest intent of Congress. It is certainly no justice, or the majority justices are capable of performing the extraordinary act of reading the mind of all members of Congress and of finding that the lawmakers contemplated habeas corpus as an adequate administrative remedy so as to justify denial of a defense to criminal prosecutions under the Act, when the Act itself is absolutely silent on the matter!

In absence of an explicit command in a statute the court is not authorized to deny to one prosecuted under the act the right to be heard in his defense which is in every criminal case a part of due process of law. In *Dismuke* v. *United States*, 297 U. S. 167, at page 172, Mr. Justice Stone, for the court, said: "But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled. *United States* v. *Laughlin*, 249 U. S. 440, 443."

This court has not given the statute a reasonable construction and has strained absence of explicit commands to a breaking point and distorted the language of Congress used in the Act so as to accomplish unreasonable results. It must be conceded that the denial of a right to be heard is oppressive. Often this court has observed that statutes broadly drawn can be used as tools of oppression and to avoid such results a strict construction should be placed thereon to avoid a tendency to infringe the rights of the people.[30]

A construction of the language of the Act should be adopted that permits a defense to the indictment. This conclusion is inescapable because to give it the construction placed upon it by the majority makes it unconstitutional.

[30] *Bank of Columbia* v. *Okely*, 4 Wheat. 235; *United States* v. *St. Paul M. & R. Co.*, 247 U. S. 310, 313; *Helvering* v. *Hammel*, 311 U. S. 504, 510.

This court has said that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[31]

The construction placed upon the statute by the court raises not only grave questions but a "succession of constitutional doubts", as suggested in *Harriman* v. *Interstate Com. Comm'n*, 211 U. S. 407, 422. See, also, *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 546.

This court has violated the cardinal rule of judicial construction of statutes, by amending the statute or reading into it something not intended by Congress. The conclusion reached is subversive of the statement of the court in *Fasulo* v. *United States*, 272 U. S. 620, 629: "There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute."

Again, in *United States* v. *Chase*, 135 U. S. 255, 261: "We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress."

In the case at bar the court admits that in the Act there is nothing stated that denies the right to make a defense to the indictment and that there is in it nothing that requires a registrant to report for induction. But, in spite of an absence of ambiguity or conflict in the language, this court

[31] *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408; see, also, *Crowell* v. *Benson*, 285 U. S. 22, 62; *Wright* v. *Vinton Branch of Mt. Trust Bank of Roanoke*, 300 U. S. 440; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; *Missouri Pac. Ry.* v. *Boone*, 270 U. S. 466; *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30.

illegally performed the *legislative* duties delegated by the people to Congress by amending the Act through "judicial legislation", thus entrenching upon the legislative power.

The argument of the majority opinion not only is contrary to fundamental concept of due process of law, but is also contrary to the spirit of this court's words expressed in *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, 195, to wit: "Learned counsel for the defendant suggests some extreme cases, showing how reckless and arbitrary might be the action of executive officers proceeding under the Act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases as and when they arise. Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they cannot find some remedy consistent with the law, for acts, whether done by governments or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of essential rights of property." Yet the court in this case is oblivious to the plain denial of the right of the defendant exempt from duty and innocent of crime. The apathy of the court to the fundamental issue involved and the voluntary restraint that the court has placed about itself to avoid passing on the questions presented here is astonishing and surprising.

The court has grafted onto the criminal law of the land a new theory which is alien and subversive of due process and has resurrected the ancient bill of attainder, pains and penalties laws of the Middle Ages, by the factitious assumption that the failure on the part of Congress to provide for defenses in the Act or to name the defenses available to the indictment imputes an intention on the part of Congress to deny defenses to the indictment. It should be noted that Congress seldom, if ever, states what evidence is admissible in proof of an offense or in defense thereto, and rarely, if at all, prescribes the defenses that might be made to an indictment. Common sense, reason and justice possessed

by all men who favor fair play and abhor oppression and tyranny dictate that due process of law of the land of liberty admits all reasonable defenses to every offense defined in the statutes.

Does not the "absence of any provision" for a defense to an indictment simply mean, as it does in all other crimes, that Congress in the Act itself defined a crime and thereby cast the matter of defenses thereto under the law of the land into the lap of the judiciary to be dealt with as all other crime is dealt with under the general criminal procedure of the courts? 18 U. S. C., s. 452 defines the offense of murder and fixes the punishment. Nowhere therein does the statute mention self-defense or accidental killing as defenses. 18 U. S. C., s. 466 defines larceny but does not mention the defense of defendant's ownership. 18 U. S. C., s. 457 defines rape: "Whoever shall commit the crime of rape shall suffer death." Nowhere therein does Congress provide for the defense of consent. "Against this background the complete absence of any provision for such challenges in the very section providing for prosecution of violations in the civil courts permits no other inference than that Congress did not intend they could be made." BLACK, J., for the majority in the case at bar. Thus to contend that the foregoing fundamental defenses to the offenses of murder, theft and rape are not available because not specifically provided by Congress would immediately be labeled by any judge and by the most inexpert lawyer as *nonsense* and without merit and contrary to the fundamental concept of due process in criminal trial, which, if permitted, would effectively sabotage criminal jurisprudence.

If Congress has not provided in the statute defining the crime what the rules of procedure or evidence shall be in prosecutions thereunder in the federal courts, upon what, then, must the judiciary depend? Surely there must be some rules to guide the courts in such instances, making it unnecessary for them to conjecture as to what Congress had in mind. The rule which has been adopted in this country

was the subject of a learned discussion by Chief Justice Taney in *United States* v. *Reid*, 12 How. (53 U. S.) 361, 363-365: "The Judiciary Act of 1787 provides for the manner of summoning jurors. . . . The Crimes Act . . . makes some further regulations. . . . But neither of these acts makes any express provision concerning the mode of conducting the trial after the jury are sworn. They do not prescribe any rule by which it is to be conducted nor the testimony by which the guilt or innocence of the parties is to be determined. Yet, as the courts of the United States were then organized, and clothed with jurisdiction in criminal cases, it is obvious that some certain and established rule upon the subject was necessary to enable the courts to administer the criminal jurisprudence of the United States. And it is equally obvious that it must have been the intention of Congress to refer them to some known and established rule, which was supposed to be so familiar and well understood in the trial by jury that legislation upon the subject would be deemed superfluous. . . . And the only known rule upon the subject which can be supposed to have been in the minds of the men who framed those acts of Congress, was that which was then in force in the respective States, and which they were accustomed to see in daily and familiar practice in the State courts."

In the instant case the opinion observes: "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process." Even if this were the 'narrow issue'—and it is difficult to understand how it could be thought to be such—nevertheless, the court's conclusions on this issue are contrary to the criminal procedure followed in this country. Heretofore, when the statutes were silent on the process of the criminal trial, the court fell back on what might be termed "American common law", as indicated in the *Reid* case, supra. While it is true that the

court is at liberty to modify these rules of common law from time to time to meet the needs of the day and effect justice, nevertheless, in absence of some showing that the common-law rule is "antiquated" or "outmoded", the court will follow the established practice. *Funk* v. *United States*, 265 U. S. 371, 381.

Has it now been found by the court that a trial by jury in open court on a charge involving a serious felony is too cumbersome and slow to meet the demands of today? Has the judiciary become so rushed and impatient that it cannot take time to hear a citizen's defense to an indictment charging him with a detestable crime?

The answer has not been left to the discretion of the judiciary. By the Fifth and Sixth Amendments the people have secured to themselves inviolate the right to a trial by jury, to be confronted with the witnesses against them, to have compulsory process for the witnesses in their favor and to have the aid of counsel in their defense. And aside from the constitutional protection of these fundamental rights, the broad principles of the American common law operate to prevent any possibility of derogation. Any doubt as to the protection afforded by the common law to these "cherished and familiar principles" disappears in the light of their background discussed by Chief Justice Taney in *United States* v. *Reid*, 12 How. (53 U. S.) 361, 363-364.[32]

In arriving at the astonishing conclusion reached by this court concerning Section 11 of the Act, the court has entirely ignored the plain language of the Act. It provides, "Any person . . . who in any manner shall knowingly fail

[32] The common-law rule of evidence is by operation of statute (28 U. S. C. 635) applicable to all common law actions in federal courts, unless otherwise provided by statute. Furthermore, according to the Final Report of the Advisory Committee on Rules of Criminal Procedure, November 1943, Rule 28 of the new *Federal Rules of Criminal Procedure* makes a similar provision.

or neglect to perform any duty required of him under or in the execution of this Act . . . shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment." The plain requisite of guilt under the act is duty for training and service. If a person is under age of duty or exempt therefrom by Congress, he has no duty under the Act and manifestly he should be permitted to establish such fact as a defense to the indictment.

The aberration of the court in this case concerning the denial of the defense because of failure of Congress to explicitly provide for same might lead much further than the inequitable result in this instance. If the court consistently applied the new theory advanced by it, the rules of presumption of innocence, burden of proof, and proof of guilt beyond a reasonable doubt should have been abrogated, because of the failure of Congress to mention them in said criminal statutes. The penalty inflicted upon the petitioner for having refused to obey a void and illegal order is dangerous and may act as a boomerang thrown by this court which may fly back upon the court with greater force of injury when cases involving other persons convicted for violations of the bureaucratic fiats of the innumerable alphabetical agencies of the federal government are appealed on the ground of denial of a defense.

No reasonable person can say that Congress intended or said anything whatever to destroy the fundamental rights of the defendants charged with violation of the wartime statutes or to abridge or deny the usual defenses allowable in criminal prosecutions. Congress having failed to provide the severe penalty of denial of the right to defend the indictment, this court has no authority to impose upon the petitioner such arbitrary penalty by converting the statute (Sec. 11), through judicial construction, into a bill of attainder and a law of pains and penalties contrary to Section 9 of Article I of the United States Constitution.

To the contrary, it is plain that Congress intended, by accepting Senator Bone's amendment to the Burke-Wadsworth Act, to avoid the terrible consequences that ensued from the Selective Service Act of 1917, under which every registrant was automatically inducted into the armed forces at expiration of the time fixed for induction. From and after that hour the registrant was *ipso facto* subject to military jurisdiction and could be dealt with as a deserter and court-martialed. This court has arrogated to itself the prerogative of nullifying the Congressional desire to avoid the tragedy of the 1917 induction of conscientious objectors and others by legislating a judicial penalty against the person who refuses to report for induction and stands prosecution under the Act. Congress intended to avoid court-martial penalties of 1917. (See note 20, page 28, infra.) The infliction of the penalty denying a defense to the indictment will inevitably result in driving persons who have grievances and conscientious objections into the armed forces and accomplish a result similar to that of 1917 contrary to the express desire of Congress.

It is certain that if Congress intended such violent conclusion as this court imputes to it, involving as it does an abrupt and reactionary deprivation of due process of law, Senator Bone, in his amendment to the criminal sanctions clause conferring upon the United States District Courts exclusive jurisdiction for offenses prior to induction, would have stated expressly that it was intended to deny the right to a full hearing in defense to the indictment. The conference report of both houses of Congress on the Bone amendment clearly implied that Congress contemplated a judicial trial in the District Court when it reported: "The Senate bill provided that persons subject to the bill who fail to report for duty as ordered should be tried exclusively in the District Courts of the United States and not by military or naval court-martial, unless such persons had actually

been inducted for the training and service prescribed in the bill." [33]

Any regulation or implication of this court which is contrary to the plain intent of Congress and the Constitution is not valid. In Section 5 (d) of the Act Congress provided that ministers of religion shall be exempt from duty of training and service under the Act, and provided that all required of them is to register. It is unreasonable that Congress would make an exemption and provide no way to protect the exemption. It is preposterous for the court to impute to Congress the intent of saying that exempt persons should report for duty and comply with void orders before they could assert their rights under the Act. It may rightly be said that Congress intended that persons subject to the statute having a duty for training and service thereunder were intended to comply with the order to report before attempting a review of their classifications in court; but it is utterly unreasonable, and amounts to an infliction of pains and penalties, to hold that a person under no duty for training and service should surrender his civilian status, subject himself to rigorous military discipline and possible punishment as a condition precedent to attacking the void order issued against him by the board.

As to petitioner, this court has indulged in a violent presumption of duty for training and service under the Act; and also has denied him his right to show that he was exempt and under no duty. Surely Congress did not intend that the draft boards should be the Supreme Law of the Land and each one the Supreme Court to determine all questions under the Act. Manifestly, Congress did not intend that such boards have the arbitrary and supreme power conferred upon them by this court to order all the judges, all members of Congress, governors of the 48 states, all members of all state legislatures, and all clergymen and ministers of religion in the land to report for induction,

[33] See petitioner's main brief, page 46.

without permitting them the right to show their exemption from duty under the Act, thus striking a killing blow to the backbone of the *home front* and demoralizing the entire war effort.

It may be objected: 'Nonsense, Congress did not anticipate such a thing, and when such occasion arises we can deal with it appropriately.' But the question is not whether the draft boards *will* do such a thing. It is whether under the ruling of this court they *can*. If they can do this under the *carte blanche* authority conferred upon them by the court, then the boards possess an unconstitutional power, contrary to the express intent of Congress.

This court has placed the position of the administrative agency above the position and dignity of the courts, holding that one who dares to transgress the 'sacred' decrees of wartime administrative agencies is guilty of such supreme contempt of their judicial powers that the highest court of the land will not grant judicial relief from their commitments for contempt until the unfortunate individuals, not subject to the jurisdiction of such agencies, have purged themselves of such contempt by compliance with the illegal orders of said boards. This places more dignity on the process of the administrative agency than that of a constitutional court. Heretofore this court has held that one committed for contempt of court for violating an injunction issued against him and from which he had not appealed could obtain relief and release by writ of habeas corpus, despite his defiance of the court, if it is shown that the committing tribunal did not have jurisdiction to issue the injunction.[34]

Regardless of whether the order to report is considered an interlocutory step in the integrating process of induction when the criminal sanction of the Act is invoked by proceedings in the district court based on the order, it

[34] *In re Burrus*, 136 U. S. 586. See, also, *Ex parte Fisk*, 113 U. S. 713, 718, and *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16, where similar conclusions were reached.

became so severed from the administrative process as to make it final and permit a full inquiry on all questions affecting the validity of the order upon which the indictment is based. This conclusion is based upon *Cobbledick* v. *United States*, 309 U. S. 323, squarely in point, where it is said: "At that point the witness' situation becomes so severed from the main proceeding as to permit an appeal. To be sure, this too may involve an interruption of the trial or of the investigation. But not to allow this interruption would forever preclude review of the witness' claim, for his alternatives are to abandon the claim or languish in jail." It is clear that if this type of review of contempt orders of courts is allowed, by the same token a like power is vested in the courts to review the proceedings brought to punish a person for contempt of the administrative agency.

The rule announced by this court turns upside down the rule of final judgments of courts and administrative agencies. It compels one to submit to the satisfaction or execution of such orders and judgments prior to obtaining relief. This is contrary to all precedent, reason and justice. The rule of "non-interference" with interlocutory orders of administrative agencies applied by this court in civil cases does not control here. In those cases a final hearing was contemplated and a final order to follow. Here all hearings have been completed and the order entered is final. It is highly inconsistent to hold that one exempt from the Act must either submit to the illegal order or else be penalized by denial of his defenses upon a trial of an indictment charging him with violation of the illegal order. The holding discriminates between those persons who comply with the illegal orders and those who choose to claim their legal rights under the Act and challenge the unlawful order, thus denying "equal justice under law".

In discussion of a statute fixing rates of a railway this court implied that a railroad which defied the legislative mandate would have the right to assert the unreasonable-

ness and illegality of the rates in defense to actions brought to recover the penalty for failure to comply therewith.[35]

The court has heretofore condemned action very similar to that approved in this case and refused to construe a statute so as to permit such results, in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 351-352, saying: "Despite the broad language of s. 902, we do not think that it should be construed as intended to deny a refund in any case where a claimant is constitutionally entitled to it. We apply the familiar canon which makes it our duty, of two possible constructions, to adopt the one which will save and not destroy. We cannot attribute to Congress an intent to defy the Fifth Amendment or 'even to come so near to doing so as to raise a serious question of constitutional law'. Federal Trade Commission v. American Tobacco Co., 264 U. S. 298, 307; Panama R. Co. v. Johnson, 264 U. S. 375, 390; Blodgett v. Holden, 275 U. S. 142, 148. When the Congress requires the claimant, who has paid the invalid tax, to show that he has not been reimbursed or has not shifted its burden, *the provision should not be construed as demanding the performance of a task, if ultimately found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled.*" (Italics added)

This court has repeatedly held that the failure of Congress to provide for judicial review of administrative orders in the Act creating the agency does not preclude judicial review as and when the district courts otherwise acquire jurisdiction of the controversy. In *Dayton Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, at page 486, the Chief Justice said: "No special provision need be made in the act for the judicial consideration of its reasonableness on the issue of confiscation. Resort to the courts for

[35] *St. Louis & San Francisco Ry.* v. *Gill*, 156 U. S. 649, 666, where it is said: ". . . and therefore, if the companies are to have any relief it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties."

such an inquiry exists under . . . the Judicial Code. It is only where such opportunity is withheld that a provision for legislative fixing of rates violates the Federal Constitution."

Disregarding similar arguments made against judicial review, this court in *Federal Radio Comm'n* v. *Nelson Bros. Bond & M. Co.*, 289 U. S. 266, 278, said: "If the questions of law thus presented were brought before the court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding. But that fact is not altered by the mere fact that remedy is afforded by appeal. . . . We must not 'be misled by a name, but look to the substance and intent of the proceeding'. *United States* v. *Ritchie*, 17 Howard 525, 534; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 479."

This court has held that the action of the administrative agency can be reviewed under the general judicial powers of the federal courts if a justiciable controversy is made out in the district court even though there is no provision in the statute for review of the order. Such reviews are commonly permitted by the court despite the provisions of the Urgent Deficiencies Act, the National Labor Relations Act, the Bituminous Coal Act of 1937, and other such agencies.[36]

Judicial review has been held to be vitally necessary, regardless of failure of the legislature to provide for it, and even in cases where the legislature has denied a review by the courts. This is because due process of law guaranteed by the Constitution makes it mandatory. This court has many times struck down state statutes as unconstitutional that denied the right of judicial review of administrative action. Long ago, in *Chicago, M. & St. P. Ry. Co.* v. *Minnesota*, 134

[36] See *Shannahan* v. *United States*, 303 U. S. 596; *United States* v. *Griffin*, 303 U. S. 226; *American Fed. of Labor* v. *N. L. R. B.*, 308 U. S. 401; *Utah Fuel Co.* v. *Nat'l Bituminous Coal Comm'n*, 306 U. S. 56; *Castleton Corp.* v. *Sinclair*, 264 U. S. 543; *Crowell* v. *Benson*, 285 U. S. 22; *David L. Moss Co.* v. *United States*, 103 F. 2d 395.

U. S. 418, at pages 456-457, this court had under consideration the Minnesota Railroad and Warehouse Commission Act which provided that transportation rates shall be final and conclusive when fixed by the commission and that no judicial inquiry thereof was permitted. Following the statute, the trial court excluded all evidence on the question of legality of the rates. After reviewing the construction placed on the Act by the Minnesoa courts, Justice Blatchford for the court decreed: "In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

"This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

Again, in *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, at page 289, a similar law was considered and declared unconstitutional on the same grounds. The court said: "Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the commission comes to be considered on appeal.

"The order here involved prescribed a complete schedule

of maximum future rates and was legislative in character. . . . In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

It seems plain, in view of these established precedents; that due process of law guaranteed by the Fifth Amendment, Section 9 of Article I, and Article III of the Constitution preclude the court from reaching the opinion that Congress, in absence of plain words so stating, intended to deny a judicial inquiry as to the applicability of the statute and want of duty for training and service thereunder prior to induction.

Rule of Non-interference with Interlocutory Administrative Orders Applicable only to Civil and Not Criminal Cases

The rights and liabilities of the petitioner under the Act must be determined as of the day that he failed to report. If the law imposes criminal sanctions for his act and conduct as of that day, without providing for a judicial hearing as to his guilt or innocence, it denies to him a trial according to due process of law. In *McVeigh* v. *United States*, 11 Wall. 259, at page 267, Mr. Justice Swayne said: "If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

Aside from the established rules of evidence, reason and common sense dictate that the trial of a criminal in-

dictment should be *de novo* and the trial court is bound to exercise its independent judgment and be guided by the ordinary rules of criminal procedure which provide for more liberal protection of petitioner's rights than do the rules of civil procedure.

The rule of non-interference with interlocutory administrative orders does not and can not apply in the trial of an indictment, and those that follow in no way affect or interfere with the administrative process or selection proceedings because the selection proceedings cannot thereafter take place under the Act, regardless of the outcome of the trial, *as the trial judge is not empowered to sentence the defendant into the armed services.* It cannot be said that the proceedings and process of the Selective Service System will thereafter be affected, because such ended completely and finally with the issuance of the order to report for induction and the failure of the petitioner to respond.

The rule of convenience for administrative agencies to complete their process so as to deny judicial interference therewith applies only in civil actions where a person subject to the jurisdiction of the agency attempts to invoke the judicial process through injunction, mandamus, etc., to stop action against the subject. It cannot have any logical or reasonable connection with the defenses that might be urged in response to an indictment in a criminal case. Certainly the issues of guilt and innocence tendered in a criminal trial by the plea of *not guilty* cannot be frittered away, especially when they have no direct connection with the completion of the selection process in raising the armed forces. To do so is to impose an illegal penalty for violation of the Act.

The criminal prosecution under the Act (Section 11) is by no stretch of the imagination a "litigious interruption" of the selective process. It is assuming a position contrary to the criminal sanctions clause itself to contend otherwise. If the prosecution of the indictment provided for in Section 11 does not interfere therewith, then of necessity the making

of a defense can have no reasonable connection with any imaginary interruption of the selection. Certainly Congress did not think so, or it would not have provided for criminal prosecution in the district courts and would have permitted the Act to remain as the Act of 1917 under which all registrants failing to report were prosecuted by court-martial for desertion. Since Congress did not provide for exclusive jurisdiction to vest with the military authority as to one failing to report for induction, it must be assumed that Congress envisioned that neither the indictment nor the making of the defense could constitute "litigious interruption" of selection and integration of manpower. Trial of the indictment is in no sense an interlocutory order. If the Constitution forbids embodying in any law denial of a defense under an indictment, then of necessity a rule of convenience to an administrative agency cannot overcome the strong provisions of the Constitution securing the fundamental right.

If in other criminal prosecutions the argument of "litigious interruption" and non-interference with the administrative agency be carried to its logical end, there would be no limit to the injury inevitably wrought thereby. The net result would be that a large percentage of innocent men would be convicted of crimes, small and great, without proof of guilt in a court of law.

In the majority opinion it is argued that there is need to deny petitioner his day in court in order to rid the administrative agency of harassing delay of the imagined litigious interruption of the integrating process. This new theory is inconsistent with the court's opinion in *Ohio Bell Tel. Co.* v. *Public Util. Comm'n of Ohio*, 301 U. S. 292, 304-305:[37] "The right to such a hearing is one of 'the rudiments of fair play' . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement. . . . There can be no compromise on the footing of convenience or expediency, or be-

[37] See also *Patton* v. *United States*, 281 U. S. 276, 290.

cause of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

In view of the fact that Congress provided exemption from all service for ministers and guaranteed a type of limited noncombatant service for conscientious objectors, it is altogether reasonable to conclude that Congress certainly did not intend that either the minister or the conscientious objector should report for induction as a condition to claiming his proper status under the Act. While Congress may have intended that persons liable for training and service under the Act should report before testing their classifications, it is certain and reasonable that Congress did not intend that persons it had specifically exempted from service should report as a condition precedent to claiming these rights under the Act. It is vain to argue that Congress intended, as a penalty, to deny the right to claim exemption from total duty for having failed to report as illegally ordered by the local board. Congress did not intend that in every case the action of the boards would be conclusively presumed to be correct and beyond judicial attack. Certainly Congress was aware that members of draft boards would be imperfect and subject to error and prejudice even as other men and that they would not be free from factional interests. It knew that the draft boards would not be so Utopian and contrary to human experience. Therefore the district courts were specifically designated to effect justice in all prosecutions under the Act, which duty necessarily requires them to weigh and decide conflicts between boards and registrants claiming exemption, in determining guilt of one charged with violation of the law. However, this court has conclusively presumed the boards to have been correct in the treatment of petitioner's claim, and thus implied that the boards were composed of perfect men free from vice and error.

Knowing the meticulous care exercised by Congress when attempting through this Act to protect the rights of conscientious objectors and ministers of religion, justice pro-

ceedings are turned into a mockery when it is said that the lawmakers intended to place an insurmountable procedural obstacle in the path of such persons exempt or deferred in the Act. One who continues to assert his right of conscience or his right of exemption as a minister against an arbitrary denial of the right by the boards is left only the choice of abandoning his conscience and his exemption and thus securing judicial review, or of following his conscience and exemption inevitably to jail.

There is absolutely no basis in reason or fact for any conclusion that there is a clear and present danger that the raising of the armed forces will be impaired or frustrated by permitting the registrant to defend to the indictment on the ground that he has no duty under the Act because exempt. There is less likelihood of any such danger through allowing this defense than there would be frustration of training program of the armed forces and camp operators under the Act by permission to test out the classification after induction. It is openly manifest that Congress intended to keep out of the forces raised under the Act for service all controversies concerning classification, and that such should be settled between the registrant and the Selective Service System in the district courts.

The number of persons eligible for exemption under the Act, including judges, legislators, governors, and ministers (including all of Jehovah's witnesses who are of draft age), comprise but a very small percentage of the population subject to the Act. There has been no rebellion from duty because of these exempting provisions. Since the exemption is provided in the law, it cannot be said by any reasonable person that the allowance by Congress of the right to show and protect one's exempt status in court would constitute a clear and present danger of a breakdown of the Selective Service System or the armed forces.

The means employed to encourage acceptance of duty as directed by the local boards by denying a defense in the courts in event of an indictment have no reasonable connec-

tion with the end to be accomplished, namely, raising an army. The doctrine could be extended to apply in all other prosecutions under the war laws so as to deny any of the usual defenses on the theory that it will discourage violations thereof. And that being established, then it could further be argued that the courts should eliminate all criminal defenses during wartime and thus suspend 'for the duration' all the institutions of liberty established by the Constitution. The price of the war is not destruction of the very things that the nation says it is fighting to preserve. Extension of the doctrine announced in this case accomplishes that very result. The connection between the Act in question and the war effort does not alter the rule that there must be a showing of a clear and present danger that integration of the armed forces for war purposes will be unreasonably impeded or destroyed by allowing the defense to a person exempt from duty to show that he is not guilty of a violation of the Act. The doctrine of clear and present danger announced by the court immediately banishes any such contention that defenses should be denied in this case. *Bridges* v. *California*, 314 U. S. 252. Any danger that might possibly arise from permitting this defense is so remote as to be clearly chimerical, imaginary and fantastic.[38]

Reasoning of Wooddeson[39] is quite appropriate: "The defense of bills of attainder relies much on the supposition of what is rarely true, and still more rarely can be proved, as it ought, tho true, that the safety of the state essentially depends on the death of the particular offender. What traitor, when discovered, can be so formidable? what people so insecure? But if we were to agree with Caffius in his assertion, *'habet aliquid ex iniquo omne magnum exemplum, quod contra fingulos utilitate publica rependitur,'* still it is exploded casuistry to support by its expediency what is allowed to be unjust."

[38] Full discussion of this matter is presented in petitioner's reply brief, pages 18-20.

[39] *A Systematical View of the Laws of England*, p. 644.

Constitutional Requirement of *De Novo* Judicial Review of "Jurisdictional Facts"

This court could have easily decided the precise question presented in this case in such a manner as to limit any such supposed dangers to a minimum by passing upon the limited and precise question of whether an exempt person can defend to an indictment; that is to say, May a district court inquire into the "jurisdictional facts" before the administrative agency? This would necessarily have eliminated the question of whether a person subject to the Act and liable for training and service and with no exemption has any defense to urge against the indictment. Thus the "danger" would have been confined to a minimum under a proper decision of this case.

The judiciary must be insensible to the many "practical" arguments asserted as justification for denial of a defense to the indictment. "It is the unique function of this Court not to dictate polity, not to promote or oppose crusades, but to maintain the balance between States and Nation through the maintenance of the rights and duties of individuals." (Chief Justice Hughes on the occasion of the ceremonies in commemoration of the 150th anniversary of the first meeting of the Supreme Court, February 1, 1940.)

In refusing to consider 'practical' arguments against Jehovah's witnesses, the Florida Supreme Court declared: "These several arguments offered in behalf of the challenged ordinance are weighty and if presented to a legislative body could not only be influential but convincing, or if made on the hustings, would be approved and applauded by the people, but a court in the discharge of duty under our system is required to be oblivious to public clamor, partisan demands, notoriety, or personal popularity and to interpret the law fearlessly and impartially so as to promote justice, inspire confidence and serve the public welfare." *State ex rel. Wilson* v. *Russell*, 146 Fla. 539, 1 S. 2d 569 (1941).

The conduct of the court in this case is clearly *judicial legislation* based on its own conception of the necessities of the military machine. The court thereby disregards the sage advice of Solicitor General Francis Bacon in his essay "Of Judicature", where it is said: "Judges ought to remember that their office is *jus dicere* and not *jus dare;* to interpret law, and not make law, or give law; . . . Judges ought to be more learned than witty, more reverend than plausible [applauded], and more advised [reserved] than confident. Above all things, integrity is their portion and proper virtue."

The present refinement of criminal jurisprudence among enlightened nations has been achieved only after many sacrifices and costly struggles. The fundamental claim of defendants to certain rights in criminal trials was acquired by the people through successive battles for liberty that are chronicled throughout the pages of Anglo-Saxon and American history. Rights thus obtained have become a fundamental part of the unwritten and the written charters of liberty. Some of the leading principles of this great system of criminal jurisprudence are: (1) Presumption of innocence of all elements of the crime; (2) Right to the benefit of any doubt as to guilt; (3) Right to a prior investigation by a grand jury and prosecution by indictment in cases of felonies; (4) Trial by jury of the elements of guilt; (5) Determination of guilt based on facts and not on character or reputation; (6) Immunity of accused one to self-incrimination; (7) Right of accused to offer evidence establishing innocence; (8) Prohibition of double jeopardy; and (9) Protection against *ex post facto* laws.

These great principles of liberty and justice are contrary to the theory of trials conducted in the lands governed by the Roman law, where opposite and oppressive rules have been evolved and applied against the accused. The above common-law principles of justice stem from the maxim that it is better that 99 guilty men go free of punishment than that one innocent man be punished. For decades

these principles have been applied for protection of the people. Most of them are guaranteed by specific provisions of the state and federal *compacts*, while others are inherent rights secured in the common law.

After briefly discussing these rights, this court in *United States* v. *Stevenson*, 215 U. S. 190, at page 199, said: "He is entitled to the constitutional protection which requires the Government to produce the witnesses against him, and no verdict against him can be directed, as might be the case in a civil action for the penalty." That the named fundamental rights are guaranteed in the due process clause against denial or curtailment by governmental agencies, as well as the courts, there is no doubt. This court, in *Ong Chang Wing* v. *United States*, 218 U. S. 272, 279, said: "This court has had frequent occasion to consider the requirements of due process of law to criminal procedure, and, generally speaking, it may be said that if an accused has been heard in a court of competent jurisdiction, and proceeded against under the orderly processes of law, and only punished after inquiry and investigation, upon notice to him, with an opportunity to be heard, and a judgment awarded within the authority of a constitutional law, then he has had due process of law. . . . *Twining* v. *New Jersey*, 211 U. S. 78, and the cases therein cited."

In *Rogers* v. *Peck*, 199 U. S. 425, 435, this court said that the defendant must be allowed an adequate opportunity to defend himself in the prosecution.[40]

In its opinion this court has decreed that it is necessary to suppress the testimony of the petitioner and to strike out all his defenses because he has been found in contempt of the administrative order. That conclusion is condemned by the court in *Hovey* v. *Elliott*, 167 U. S. 409, at pages 413-418, where Mr. Justice White said: "[A] more fundamental question yet remains to be determined, that is, whether a

[40] Full discussion of history of the fundamental right to be heard in all defenses to an indictment charging crime is included in petitioner's main brief. See pages 22-38, 54-58.

court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends. . . . Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists, then in consequence of their establishment, to compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent."[41]

When the Arizona civil code took away the remedy of

[41] Read also *Lisemba* v. *California*, 314 U. S. 219, 236.

injunction in certain controversies between desig nated classes of persons this court held the same was in violation of the due process clause. *Truax* v. *Corrigan*, 257 U. S. 312.

In *Edwards* v. *United States*, 312 U. S. 473, this court held that the striking of a plea in bar because it was unmeritorious and could not be sustained in law or fact was a denial of due process and constituted reversible error.

In *Dowdell* v. *United States*, 221 U. S. 325, 330, the statute accomplishing results similar to the criminal sanctions clause of the Act as construed in this case was declared invalid. The court said: "This provision of the statute intends to secure the accused in the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet him face to face at the trial, who give their testimony in his presence, and give to the accused an opportunity of cross examination. It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witnesses in the exercise of the right of cross examination."

In the case at bar the reality is that the petitioner is actually convicted before the draft boards, with the courts merely imposing punishment upon *ex parte* evidence which does not have the searching light of cross examination, often hearsay, without source of it known, without confrontation of witnesses, without judicial guidance, without findings of fact to support a conclusion and judged by the unrestrained decision of the 'butcher, baker and candlestick maker' variety of persons who make up the *"judicial body"* of the local boards. This permits a denial of due process and converts the Bill of Rights into a *bill of no rights*. Compare *Diaz* v. *United States*, 223 U. S. 442.

In *Wong Wing* v. *United States*, 163 U. S. 228, the statute that permitted the immigration officer to exclude the alien by order rendered under administrative power, also allowed him the right to impose a penalty and punishment in addition. The law was declared invalid. This court said:

"It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."

In order to avoid the consequences of declaring the proceedings and the statute or regulations authorizing same invalid, the Constitution requires that there shall be available an adequate judicial review of the statutory validity of the order or judgment of the administrative agency assuming to act in the premises. In American courts no conviction can be authorized under the Constitution unless evidence is offered which tends to prove the essential elements of the crime charged. In *Tot* v. *United States,* 319 U. S. 463, at page 473, the court declared the Federal Firearms Act invalid, saying: "The Act authorizes, and in effect constrains, juries to convict defendants charged with violation of the statute even though no evidence whatever has been offered which tends to prove an essential ingredient of the offense."

It has previously been held that before one can be punished for disobeying an administrative order he shall have an opportunity to test its validity in court. In *Panama Ref'g Co.* v. *Ryan,* 293 U. S. 388, it is said: "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission." See *Brown* v. *Wyatt Food Stores,* 49 F. Supp. 538, 540.

When Congress provides for exemption of ministers of religion and removes them from the reach of the draft boards, how can it be said that the board's order drafting a minister for service is within that agency's statutory authority? The law dictates that the order is in excess of the jurisdiction of the administrative agency as to one exempt. *Wise* v. *Withers,* 3 Cranch 331.

On this question Mr. Chief Justice Stone, in *Columbia*

Broadcast'g System, Inc. v. *United States,* 316 U. S. 407, at page 425, said: "The ultimate test of reviewability is not to be found in an overrefined technique." The court's opinion in adopting the government's argument in this case has done just that, namely, indulged in an "overrefined technique". If the decision is permitted to stand it will place the draft boards in a position to supplant the standing law and substitute the administrative fiat as the supreme law. In *Jones* v. *Securities & Exchange Comm'n,* 298 U. S. 1, 23-24, it was held that an action finding no support in law or an arbitrary finding can be attacked in court by hearing. The court said: "It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest —that this shall be a government of laws—because to the precise extent that the mere will of an official, or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the Government ceases to be one of laws and becomes an autocracy."

It should be remembered that this court has said: "There are no constructive offenses, and before one can be punished, it must be shown that his case is plainly within the statute." (*Fasulo* v. *United States,* 272 U. S. 620, 629) Therefore it can be reasonably argued that it is the burden of the government to prove defendant's duty for training and service, beyond a reasonable doubt. The government cannot be relieved of that burden by relying upon a spurious presumption of validity of the order to report, because that presumption is overcome by the stronger presumption of innocence.[42]

This court has repeatedly struck down statutes providing for rates or taxes directly, or the fixing of rates or taxes indirectly through administrative agencies, because such

[42] *Jones on Evidence, Civil Cases,* 4th ed., Vol. 1, pp. 176-180; *Dunlop* v. *United States,* 165 U. S. 486; *Edwards* v. *United States,* 7 F. 2d 357; *Underhill's Criminal Evidence,* pp. 49-54. See also *Tot* v. *United States,* 319 U. S. 463.

statutes were without provision for a judicial review to protect the constitutional rights of due process and freedom from confiscation. Furthermore, the court has held unconstitutional statutes which subject the person aggrieved to possible penalties and punishments prior to judicial review. A like disposition was made of statutes which either directly or indirectly imposed such deterrent conditions as to render illusory the remedy of judicial review. It would unduly prolong this petition to quote pertinent parts of those opinions. They are listed in the margin[43] for convenience of the court.

In the case at bar the court argues, in effect, that there is a way open for judicial review if the objector or minister will compromise his conscience and his legal rights and submit to induction and undergo the possible penalties of military court-martial for infraction of military rules pending judicial review.

This court further says that the possibility of acquiring this expensive and uncertain judicial review adequately satisfies due process, thus permitting denial of proper defense to the indictment. This precise argument has been rejected and condemned by the court. The same sort of remedies were offered in *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, where the court said: "If he fails to satisfy the Commission that it erred in this respect, a judicial review is opened to him by way of appeal on the whole record to the Supreme Court. But the penalties, which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident. . . . Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if

[43] *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289; *Willcox* v. *Consol'd Gas Co.*, 212 U. S. 19, 53; *Missouri Pac. Ry. Co.* v. *Nebraska*, 217 U. S. 196, 207-208; *St. Louis & San Francisco Ry.* v. *Gill*, 156 U. S. 649, 666; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 456-458; *Wadley Sou. Ry. Co.* v. *Georgia*, 235 U. S. 651, 660-663; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 336-340; *Ex parte Young*, 209 U. S. 123, 147.

otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates." Cf. *Dayton Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 486.

That it is beyond the authority of a draft board to order a minister of religion to report for induction contrary to the statute is plain. If one is exempt there is a complete absence of jurisdictional facts upon which to act against the individual. All that Congress required a minister of religion to do is to register his name, address, and occupation. No further duty is required of him, and the board is precluded from taking any further action against the minister. If a board wrongfully or mistakenly orders a minister to report for induction, the order is void because Congress divested the board of jurisdiction to do so. The illegal action of the board in disregarding the exempt status of the minister does not alter his status or make him liable for training and service under the Act.

Therefore, a minister exempt from duty may defend against an indictment for failing to respond to an order to report on the grounds that the classification given, the refusal to grant the exemption and the order to report for induction are void because (1) in excess of authority of the board, (2) beyond the jurisdiction of the board, (3) contrary to law, (4) without substantial evidence to support the action taken, (5) contrary to the undisputed evidence, (6) arbitrary and capricious, and (7) deprives the person of liberty without due process of law.

The court can make an independent inquiry as to the action of the board on any of the above matters, and in deciding the questions is not bound by the findings or determinations of the administrative agency, because each of the questions involved is judicial in its nature and such are not administrative discretionary matters. On many or all of these issues the petitioner is entitled to a trial *de novo* before the district court.

The *discretionary* decision of draft boards in reference to classifications of persons under a duty for training and service pursuant to the Act and Regulations are, under decisions of this court on administrative law, final unless unsupported by substantial evidence, arbitrary and capricious or made in violation of procedural due process. However, this rule does not cover the action of the boards in reference to classifications contemplated by the statute entirely exempting and removing registrants from duty under the Act. In such cases the boards are responsible to the United States courts for a proper adherence to the statute, as much as to the classification to be given designated groups as to their personnel arrangements. The distinction is well stated in *Crowell* v. *Benson*, 285 U. S. 22, 63, by Chief Justice Hughes: "The question in the instant case is not whether the Deputy Commissioner has acted improperly or arbitrarily as shown by the record of his proceedings in the course of administration in cases contemplated by the statute, but whether he has acted in a case to which the statute is inapplicable." Accordingly, in *Wise* v. *Withers*, 3 Cranch 331, this court has held that if one is of that class exempted by Congress from military duty the statute commanding duty for training and service is not applicable to the exempt person and the administrative agency has no jurisdiction.

The question as to the inherent power of the administrative agency to act in respect of the subject of registrants' duty for training and service depends upon the facts before it. If the facts show that a duty exists, there is jurisdiction and power of the administrative agency to act. If the facts do not exist to show duty and establish exemption, there is no jurisdiction or power to order such registrant to report for training and service. In the field of administrative law these considerations are known as "jurisdictional facts".

"A different question is presented where the determinations of fact are fundamental or 'jurisdictional', in the sense that their existence is a condition precedent to the operation of the statutory scheme." *Crowell* v. *Benson*, 285 U. S. 22, 54.

The distinction made in the *Crowell* case, supra, has been applied in a wide variety of administrative law cases. Brief discussion of a few is sufficient to demonstrate the need for application of the rule to the instant controversy.

In cases concerning validity of administrative orders deporting aliens, this court has repeatedly held that such agencies have no authority to deport a citizen and that the making of the claim of citizenship supported by substantial evidence thereof constitutes a denial of jurisdiction and the finding of the agency on such 'jurisdictional fact' is not binding on the court and can be determined in a judicial trial *de novo*. In an action brought under Section 9 of the Immigration Act to recover penalties (analogous to the criminal action here), this court said: "The action of the Secretary is, nevertheless, subject to some judicial review, as the courts below held. The courts may determine whether his action is within his statutory authority." *Lloyd Sabaudo* etc. v. *Etling*, 287 U. S. 329. The same rule was followed in the earlier case of *Gonzales* v. *Williams*, 192 U. S. 1, 15.

In *Kessler* v. *Strecker*, 307 U. S. 22, 34-35, it was declared: "The status of the relator must be judicially determined, because jurisdiction in the executive to order deportation exists only if the person arrested is an alien; and no statutory proceeding is provided in which he can raise the question whether the executive action is in excess of jurisdiction conferred upon the Secretary." Mr. Justice Brandeis, in *Ng Fung Ho* v. *White*, 259 U. S. 276, at page 284, said: "The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service."

The court ruled in the military cases that when enlistment is denied such is a denial of jurisdiction and is a jurisdictional fact for determination by the court *de novo* without limitation by the determination made by the military agency. Likewise denial of induction authority by claiming

exemption raises a question of authority of the board to act and is a jurisdictional fact to be determined by the court. *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876, 882; *Givings* v. *Zerbst*, 255 U. S. 11, 20; *In re Grimley*, 137 U. S. 147. See also the 37 cases cited in note 95, page 65, petitioner's main brief. The rule was restated by Chief Justice Hughes in *Crowell* v. *Benson*, 285 U. S. 22, 58.

In the adminstration of the public land system questions of fact are for determination of the Land Department. The determinations of that agency are conclusive. It is equally true that if lands never were public property, have been previously disposed of, or if Congress had not made provision for their sale, or exempted them for sale, the department has no jurisdiction to sell or transfer such lands. Determination in such cases is not binding on the courts, and an inquiry can be made upon a trial *de novo* in proceedings brought to attack collaterally the order of the department. *Smelting Co.* v. *Kemp*, 104 U. S. 636, 641; *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165; *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10; *Morton* v. *Nebraska*, 21 Wall. 660. Typical of the rulings in these cases is *Burfenning* v. *Chicago St. P. R. Co.*, 163 U. S. 322, 323, where it is said: "But it is also equally true that when by Act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof." This language is appropriately apposite to this case concerning limitation of the authority of the draft boards in dealing with ministers of religion who are exempt from duty under the Act.

In workmen's compensation cases there are certain facts which must exist before the operation of the statu-

tory scheme can begin. As to such 'jurisdictional facts' the final arbiter is the court, not the agency. *Crowell* v. *Benson*, 285 U. S. 22. So also is the rule in *abandonment of line* cases concerning Interstate Commerce Commission determinations, such as whether trackage is "spur" or "industrial". In *United States* v. *Idaho*, 298 U. S. 105, 109-110, the court said:

"Appellants object that since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive, and that it was error to admit the testimony first offered in the District Court. Compare *Gagg Bros.* v. *United States*, 280 U. S. 420, 444. Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellee's counsel concede, the court did not err in admitting the additional testimony. For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court; not to the final determination of either the federal or a state commission." This particular quotation should show conclusively the error of the district court in excluding all the evidence offered by petitioner to show proof of his ministry and exempt status under the Act. On January 3, 1944, the decision date in this case, this court approved the *Idaho* case, saying, *inter alia:* "Congress has not left that question exclusively to administrative determination; it has given the courts the final say." *City of Yonkers* v. *United States*, No. 109 October Term 1943.

Under the Interstate Commerce Act and related statutes the following questions have been held to be for final determination by the courts, whose judgments are not bound by the findings of the administrative agency, that is to say, whether a party is a "person"; whether a person is a "shipper"; whether a party is a "common carrier", a "carrier by railroad", or a "carrier involved"; whether two railroads not actually contiguous are "connecting

carriers"; whether person is "intermediate carrier".[44]

Even the unauthorized issuance of a patent is not conclusive upon the judgment of the court. *Doolan* v. *Carr*, 125 U. S. 618-625. Whether a vessel is actually "captured" is a jurisdictional fact on which the determination of the prize court is not conclusive. *Rose* v. *Himely*, 4 Cranch 241, 269.

Constitutional Requirement of Judicial Inquiry as to Board's Adherence to Due Process in its Administrative Functions

Assuming *arguendo* that this Court can correctly reach the conclusion that the exemption provided by Congress in this case does not convert a determination thereon by the draft boards into one on "jurisdictional facts" under the above cases, it is still contended that the courts have authority to review the draft boards' determinations because there is presented a judicial and constitutional question of whether the petitioner has been denied his rights and liberties without due process of law. No ranker violation of the due process clause can be imagined than that of illegally and arbitrarily removing all rights of citizenship from an individual, denying him his liberty and placing him in a status subject to military jurisdiction without some means of judicial review. The fact that he is liable to lose his liberty, either through induction or prosecution, presents a justiciable constitutional question under the due process clause of the Fifth Amendment. It is therefore for the courts to decide whether petitioner is threatened with loss of liberty or has been actually denied liberty without due process of law in view of the fact that he is not under duty for training and service.

[44] For the cases on these and other questions, the Court is referred to *Federal Administrative Law* (Vom Baur, 1942) Vol. 1, pp. 461-462. For a listing of the many other administrative determinations that are subject to judicial review see pp. 434-472 *op. cit.*, particularly the discussion of questions under the National Labor Relations Act, p. 465 *op. cit.*

In *Crowell* v. *Benson*, 285 U. S. 22, 56-57, the Chief Justice summarizes the whole matter: "It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of facts upon which the enforcement of the constitutional rights of the citizen depends. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

Again, in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 50-52, the Chief Justice said: "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded.

It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

The courts have continuously and consistently provided judicial review and protection so as to prevent the confiscation of property without due process of law by payment of a fair price or allowing fair returns.[45]

Even where the courts have found no erroneous decision on a jurisdictional fact or a constitutional question, a review of the administrative determination has always been permitted where the particular finding or order affecting the substantial rights of the party is shown to be arbitrary and capricious or that in arriving at such determination the administrative agency violated procedural due process in conducting the administrative proceedings. Therefore if the Court concludes that the statute confers no extraordinary right on petitioner by providing for the exemption of ministers of religion and that the determination of his classification is similar to that of all other registrants not favored by the statutory exemption, it is nevertheless the duty of the Court to permit a review in defense to the indictment on this consideration alone.

Petitioner showed conclusively that he was a minister of religion. (R. 17-18; 52, 56, 57, 67-79) There was not one scintilla of evidence or testimony offered before either

[45] *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649; *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349; *Federal Administrative Law* (Vom Baur, 1942) Vol. 1, pp. 337-404.

the local board or the trial court that petitioner was not a minister of religion. Nor did anyone claim that he fictitiously made the claim for exemption as such. Had there been any such evidence, it would have been the duty of the boards to reduce it to writing and place it in the files.[46] There is no written report of any such evidence in the files of the local board.[47]

Therefore, for the purpose of deciding this case on the undisputed evidence and record before the court it must be conclusively assumed that petitioner is a minister of religion within the meaning of section 5 (d) of the Act.

In this court's opinion it is said: "Petitioner, 25 years of age, unmarried, and apparently in good health, registered with his local board on October 16, 1940." His age, marital status and condition of health do not in any degree affect his exempt status as a minister, any more than the age, condition of health, etc., would affect the exempt status of one of the justices of this court under the Act. Even the most disingenuous person knows that a man may be a minister of religion and competent to discharge his duties as such regardless of whether he is 25 years of age, married or unmarried, and "apparently in good health". Even a *peg-legged* man can be a minister as well as an able-bodied man. These factors do not constitute adequate proof against the exempt status of petitioner or his claim under the Act.

Still assuming, for the purposes of argument only, that the decision of the local board on the question presented was one not jurisdictional or not constitutional, but one of administrative discretion, it is necessary to determine whether or not the classification, finding and order of the board was based on substantial evidence. It is found that it is not, then it is the duty of the court to acquit the defendant or at least permit a judicial review of the

[46] Reg. s. 623.2. See also Opinion No. 14, par. 6, at pp. 39a-43a of APPENDIX to petitioner's brief.

[47] Cf. Petitioner's reply brief, pp. 4-9.

question before a conviction can be entered. There must be a rational basis in evidence for the conclusions reached by the administrative agency.[48]

The only court that has thus far manifested the courage to permit one indicted for failure to respond to an induction order of a draft board to show in defense that the order is illegal, has accordingly concluded that the least permissible inquiry on such a trial is whether the classification and order were made arbitrarily and capriciously.[49]

It has been held that the court must examine the evidence to determine if there is substantial evidence to support the finding. *Substantial* evidence is more than a mere *scintilla*. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The first duty of the draft board under the Regulations was to examine the questionnaire submitted by petitioner to see if there was any evidence that justified placing him in some classification that would exempt him from duty under the Act. It was the affirmative duty of the local board and likewise the appeal board to place petitioner in class *IV-D* unless they could find substantial evidence that he was not a minister of religion.[50]

There was not one iota of evidence that petitioner was not a minister. On the contrary, the undisputed evidence before the board showed he was a minister of religion. The finding and subsequent order of induction by the board is unsupported by substantial evidence and against the weight of the uncontradicted evidence, and therefore put petitioner under no legal obligation to respond.[51]

[48] *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251 *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. See also *Federal Administrative* Law (Vom Baur, 1942). Vol. 2, pp. 564-585.

[49] *Baxley* v. *United States* (CCA-4), 134 F. 2d 998; *Goff* v. *United States* (CCA-4), 135 F. 2d 610.

[50] Reg. s. 623.21, 627.25, 627.26. See also Lewis, "Appeal Procedure Under the Selective Service Law" (1942), 17 Ind. L. J. 273, 281-282.

[51] *W. V. & M. Coach Co.* v. *N. L. R. B.*, 301 U. S. 142, 147; *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229, 230; *Spiller* v. *A. T. & S. F. R. Co.*, 253 U. S. 117.

Where a commissioner of immigration ignores the question presented to him, as did the draft board here, and the evidence pertaining to it, as here, and takes away the right of hearing, the commissioner's order was held void. *White* v. *Chin Fong,* 253 U. S. 90.

The rule with respect to a jury verdict in judicial proceedings is substantially the same. *Ginning* v. *Cooley,* 281 U. S. 90.

An administrative order that is based upon a finding on an administrative question, and is not supported by substantial evidence, must be set aside by the judiciary as arbitrary and capricious and as constituting a denial of due process of law.[52]

The finding of the agency cannot be presumed to be supported by substantial evidence, because of the presumption of innocence that dominates in criminal proceedings.

Where the hypothetical statement of facts set forth in an opinion by the head of an administrative agency, such as Opinion No. 14 of National Headquarters of Selective Service System concerning Jehovah's witnesses, is indistinguishable on the facts of the case of petitioner before the boards, and such boards reject the opinion and set up their own standards of behavior and classification, as did the boards here, the orders issued thereafter are null and void and must be set aside by the judiciary as arbitrary and capricious.[53]

It is submitted that for draft boards "to rest their interpretation of statutes on nothing but their own conception of 'morals' and 'ethics' is, to say the least, dangerous business." (Mr. Justice Black in *The Mercoid Corporation* v. *Mid-Continental Investment Company,* Nos. 54 and 55, October Term, 1943.)

[52] *United States ex rel. Vajtauer* v. *Commissioner,* 273 U. S. 103. See Mr. Justice Pitney's statement in *L. & N. R. Co.* v. *Finn,* 235 U. S. 601, 606. Cf. *R. R. Comm. of California* v. *Pac. Gas & Elec. Co.,* 302 U. S. 388.

[53] *Miller* v. *Standard Nut Margarine Co.,* 284 U. S. 498.

In addition to the foregoing, there is another reason why the order of the local board should have been set aside. The board violated procedural due process provided by the Selective Service Regulations (sections 625.1 and 625.2) allowing a registrant a hearing when requested. That a hearing before the board was denied in this case is undisputed; and regardless of the subsequent proceedings before the appeal board, this defect in procedural due process was never cured. Before an appeal was taken and the time for requesting a hearing had expired, the local board had speedily and surreptitously and contrary to the regulations delivered the petitioner's file into the hands of the appeal board, which was apparently a party to the conspiracy to give him an improper classification and deny his rights to ministerial exemption. It should be noticed that the appeal board acted speedily, promptly, and injudiciously by denying his exempt status and placing him in a classification for training and service before he had actually appealed from his classification. (R. 58) The local board chairman, on denying the request for hearing, said: "I do not have any damned use for Jehovah's witnesses." (R. 32-33).

Administrative agencies must act in accordance with the cherished judicial tradition underlying the basic concepts of fair play. See *Morgan* v. *United States*, 304 U. S. 1, 14-15, particularly noting page 22 where the Chief Justice said: "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority." When the *Morgan* case was before the Court previously (298 U. S. 468, 479-481), the Chief Justice said: "If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." The requirements of fairness and opportunity to be heard extend to every portion of the hearing. They are not exhausted

in taking of evidence, but extend to the concluding part of the hearing.[54]

Mr. Justice Rutledge's Concurring Opinion

Turning to the objection of Mr. Justice Rutledge in his concurring opinion in this case, it is observed that petitioner's exceptions to the illegal proceedings of the local board did not become moot by the action of the appeal board in affirming the original I-A classification or changing it to class IV-E. Each classification made the petitioner liable for training and service. The issue to be determined was not whether there was a change of classification; but, Was the exemption denied by each board refusing the claim for IV-D classification? The appeal board acted very much as does an appellate court. It did not hear the witnesses and receive evidence *de novo*. It reviewed the record made before the local board and ordered petitioner's claims denied in the same way that this court reviews a record and decides a case.

The affirmance of the classification by the appeal board and the refusal of the Director and the State Director to exercise discretion to change same is the same as exhausting the judicial remedies and appeals in a state court system before coming to this Court on appeal urging a federal question. When the government obtained the indictment and the petitioner pleaded 'not guilty' the issue was placed before the district court, which is analogous to bringing a federal question to this Court for decision. The fact that the appellate courts of the state did not act prejudically or violate due process themselves does not prevent this Court from reversing a judgment on the record made in the state trial court. The same principle applies here to a review of the orders of the local board.

[54] *Interstate Commerce Comm.* v. *Louisville & N. R. Co.*, 227 U. S. 88; *Ohio Bell Telephone Co.* v. *Public Utilities Comm.*, 301 U. S. 292, 304.

By this plea of 'not guilty' the petitioner attacked the order to report for induction, which is an attack against all previous proceedings of the appeal and local boards. It was not necessary to specifically name the appeal board.[55]

Furthermore, the argument that no attack is made on the appeal board carries no weight since the trial was *de novo* in the district court on judicial questions. It was not necessary to make some technical statement that petitioner was attacking the ruling of the appeal board also. Legal proceedings and rights of defendants in a criminal case, which are among the most substantial possessions of the people of this land, cannot be frittered away or denied by an "overrefined technique". The entire record of this controversy shows that petitioner was complaining because the boards did not allow to him the exemption provided by Congress. The government did not claim that it was misled in this connection. An inquiry on this serious and fundamental question cannot be denied because of an irrelevant technicality that does not affect the merits of the claim made. At any rate, this objection does not at all affect the far-reaching and fundamental constitutional questions involved.

"What is to become of constitutions of governments if they are to rest, not upon the plain import of their words, but upon conjectural enlargements and restrictions to suit the temporary passions and interests of the day. . . . They are not to be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders; they are to speak the same voice now and forever." (Justice Story, *Commentaries on the Constitution*, Vol. 2, p. 653)

[55] See Reply Brief of Petitioner, pp. 22-24 for additional argument on this point.

Constitutional Requirement of Trial By Jury Violated By Instructed Verdict of Guilty

There is another fundamental vice that pervades the entire proceedings in this case and which apparently has met with the approbation of this Court. The trial court in no uncertain terms instructed the jury to return a verdict of guilty against the defendant. (R. 41) This Court quoted from the charge: "If you find from the facts that he failed to report—and there is no evidence to the contrary . . . it would be your duty to find him guilty." No reasonable man can deny that this amounts to an instruction to find the defendant guilty. Such is contrary to established fundamental law of criminal jurisprudence and is reversible error regardless of whether petitioner had a legal right to question the classification. Even an obviously *guilty* person is entitled to a fair trial by jury according to due process. Merely because the court feels convinced of his guilt, there is no occasion to instruct the jury to find him so. The determination of this question is the province of the jury under the Constitution, and the court must not entrench upon their function. In thus instructing the jury the trial court abridged the constitutional right of trial by jury, contrary to Article III of the Constitution and the Fifth and Sixth Amendments.[56]

See *Viereck* v. *United States*, 318 U. S. 236, 247-249, where it is said: "At a time when passion and prejudice are heightened by emotions stirred by our participation in a great war, we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted."

It is difficult to understand how this Court can approve

[56] *United States* v. *Stevenson*, 215 U. S. 190, 199; *Patton* v. *United States*, 281 U. S. 276; *Blair* v. *United States*, 241 F. 217; cert. denied 244 U. S. 655; *Cain* v. *United States*, 19 F. 2d 472; *United States* v. *Taylor*, 281 U. S. 276.

of the instruction given to the jury in this case, in view of the deep appreciation of its duty to protect due process of law in criminal cases, so eloquently expressed by Mr. Justice Black in *Chambers* v. *Florida*, 309 U. S. 227, 236-241: "As assurance against ancient evils, our country, in order to preserve 'the blessings of liberty', wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed. . . . No higher duty, no more solemn responsibility rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion."

The majority opinion in this case terms petitioner's efforts to secure a judicial review of the order requiring him to surrender his civilian status as a "litigious interruption of the process of selection" and conveys the impression that the question is so free from doubt that the contentions thus asserted are frivolous. The Court observes: "*Today, one year and four months after this order, he is still litigating the question.*" It seems fair to assume that the Court thus expresses its disapproval of appeals in cases of this nature because of the delay occasioned thereby. It has always been thought that the doors of appellate courts were never closed, even to the obviously guilty, if the construction of a new statute or a constitutional question is properly presented. Surely one who is innocent and is wrongfully branded guilty should have an equal chance with the guilty to escape the anathema of the court against appeals in these cases. The conclusion of the court seems to be that not only should no defense be allowed in the trial court, but also that no appeals should be taken.

Court's Decision and the War Effort

It is not the prerogative of the United States Courts to surrender any of their power or to refrain from exercising judicial functions in wartime. Although this court may have thought that it was contributing to the "all out" war effort and welfare of the nation by construing the statute so as to penalize those who fail to report for induction and thereby discouraging delinquency, the converse is true. In *Ex parte Milligan,* 2 Wall. 2, 120, Mr. Justice Miller said: "Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

The greatest contribution the members of this court can make to the strength of the nation in this time of crisis is to preserve the fundamental law against any and all encroachments. To take any other course, because of the fear of a breakup or disintegration of the war effort, fear of Hitler or the fear of anything except the Constitutional mandate, inevitably leads to a trap and a disintegration of the judiciary and the balance of power between the three departments of government. "The fear of man bringeth a snare: but whoso putteth his trust in the LORD shall be safe." (Proverbs 29:25) "The fear of the LORD is the beginning of wisdom."—Psalm 111:10.

The rank fallacy of assuming that the court's construction of the statute aided the war effort is pointed out by Mr. Justice Murphy in his dissenting opinion: "To say that the availability of such a review would encourage disobedience of induction orders, or that denial of a review would have a deterrent effect, is neither demonstrable nor realistic. There is no evidence that petitioner failed to obey the local board order because of a belief that he could secure a judicial reversal of the order and thus escape the duty to defend his country. Those who seek such a review are invariably those whose conscientious or religious scruples would prevent them from reporting for induction regardless of the availability of this defense." Only concurrence of the majority justices with the correct view expressed by Mr. Justice Murphy can pay proper tribute to his judicial integrity in this case, and it is suggested that the majority align themselves with that view as was finally done with the opinion of Mr. Justice Stone in the Flag Salute case.

The constitutional *watch,* with its finely balanced works—the branches of government divided and each to a degree restrained by ties to the other branches—has been seriously injured by the *fall* of the court in this case. Such a delicately balanced instrument could easily stop functioning altogether by the unbalancing of the powers. Unless the governmental equipoise is promptly restored, the hands of time will be found to have stopped, pointing backward to the tyrannous pre-revolution era.

Conclusion

Wherefore petitioner prays that the order and judgment heretofore entered herein affirming the judgments of the courts below, be set aside and held for naught, and that on the briefs heretofore submitted, this petition for rehearing be granted and the court render an order reversing the judgment of the courts below, or, in the alternative, order the cause to be reargued orally. Petitioner prays for such other relief as he may show himself justly entitled to in the premises.

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Certificate

We, the undersigned counsel for petitioner, do hereby certify that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

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